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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1572

THE UNITED STATES EX REL. CHARLES R. MILLER,
PLAINTIFF IN ERROR,

vs.

GREEN B. RAUM, COMMISSIONER OF PENSIONS.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED FEBRUARY 26, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, FEBRUARY 28, 1890.

1 *Petition. Filed Nov.* 11, 1889.

In the Supreme Court of the District of Columbia the 11th day of November, 1889.

THE UNITED STATES *ex Relatione* CHARLES R. MILLER
vs.
GREEN B. RAUM, Commissioner of Pensions.

Mandamus.
At Law. No. 30102.

To the honorable the chief justice and associate justices of the supreme court of the District of Columbia:

The petition of your relator, Charles R. Miller, respectfully represents:

1. That he is a citizen of the United States, residing for the time being in the city of Washington, in the District of Columbia, and brings this action in the name of the United States for and in his own behalf for the writ of mandamus against the respondent.

2. That the respondent, Green B. Raum, is a citizen of the United States, residing also for the time being in the said city of Washington and District of Columbia, is the Commissioner of Pensions, and as such is sued, as hereinafter set forth.

3. And your relator says that during the war of the rebellion of 1861 he was in the military service of the United States and served in Company "D," 8th Ohio Cavalry Volunteers, a military
2 organization duly enrolled and mustered into said military service; that while in said service and in the line of duty he sustained in battle such wounds and injuries as resulted at the time thereof in his total and permanent helplessness; that his said wounds and injuries resulted in the necrosis of the lower vertebræ of the spine, followed by anchylosis of the spinal column, the necrosis of the bones of his left leg and foot, followed by anchylosis of the left knee, ankle, and toes of the left foot, and great atrophy of the entire limb, whereby he became was, and still is, so totally and permanently disabled as to be rendered utterly helpless or so nearly so as to require the regular personal aid and attendance of another person.

And your relator further says that he was discharged from said military service August 27, 1865, and avers that for his said disability the law, in plain and precise terms, provides the following rates of pension, namely, $8 per month from date of discharge; $25 per month from June 6, 1866; $31.25 per month from June 4, 1872; $50 per month from June 4, 1874, and $72 per month from June 17, 1878, provided application therefor had been made to the Commissioner of Pensions at any time prior to July 1, 1880, and he made such application immediately upon his discharge from the said military service as aforesaid.

5. But your relator alleges that the Bureau of Pensions, under the administration of the predecessors of the respondent, granted

to your relator a pension for the total and permanent disa-
3 bility of the left leg only, and granted him a rating therefor by pension certificate No. 55356 of $8 per month from date of discharge, $15 per month from June 6, 1866, $18 per month from June 4, 1872, $24 per month from November 23, 1881, and $30 per month from March 3, 1883, the rates that are specifically provided by law for his said total and permanent disability alone of the left leg, instead of granting him a pension for his entire disabilities of the back and leg as aforesaid and at the aforesaid rates, as provided by law therefor.

6. And your relator further says that he often applied to have the said error corrected, and often demanded of the Commissioner of Pensions for the time being the reissuance of his said certificate, with ratings so corrected as to be conformable to law and commensurate with his entire disabilities aforesaid; but he avers that the Pension Bureau, under the predecessors of the respondent, refused to comply with his demands and rejected his said applications.

7. And your relator further says that after repeated fruitless efforts to obtain, at the hands of the Pension Bureau, a proper and impartial administration of the pension laws in his behalf he finally appealed from the adverse action, ruling, and decision of the then Commissioner of Pensions to the Secretary of the Interior to redress his grievances; and he says that this whole controversy between himself and the Pension Bureau respecting the question of the rating of his pension came before the head of the Department
4 for his official action and decision; and he avers that the Secretary, upon a personal, careful inspection of the record and all the evidence filed therein in his case and upon due consideration thereof, made and rendered the following official decision:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *February* 12, 1885.

The Commissioner of Pensions.

SIR: Herewith are returned the papers in the pension claim, certificate No. 55356, of Charles R. Miller.

It appears from the papers that Mr. Miller's claim was before this Department on the 6th instant, and it was held that "the pensioner is greatly disabled; and it is evident from the papers in his case that he is utterly unable to do any manual labor, and is therefore entitled to $30 per month under the act of March 3, 1883, which has been allowed him by your office."

Since the departmental decision above referred to the papers in the claim have been carefully reconsidered by the Department and a personal examination of the pensioner made, and it satisfactorily appears that he is unable to put on his shoe and stocking on the foot of the injured leg for the reason that the "nearest point that can be reached by hand from foot is 23 inches," and for the further reason that from "necrosis of the lower vertebræ of spine, producing anchylosis of the spinal column and destruction of some of the spinal nerves," he is unable to bend his back.

After a careful review of all the facts in this case the De-
5 partment is constrained to think that the pensioner comes under the meaning of the law granting pensions to those persons who require regular aid and attendance.

The decision of the 6th instant is therefore overruled in so far as it denies that the pensioner requires regular aid and attendance.

Very respectfully, HENRY M. TELLER,
Secretary.

And he further says that this decision of the Secretary was made not only after a careful inspection of his person, for which purpose his clothing *being* entirely removed and thus exposing to the sight of the eye the causes of his disability, as well of the back as the leg injuries, but upon a comparison of the same, as they then appeared to the natural sight, with the five original photographic views of his said injuries of the back and leg taken by the Army Medical Museum nearly twenty years prior thereto and at about the date of his discharge from the military service as aforesaid.

The language quoted by the Secretary in his said decision descriptive of his disability and the back injury is taken from said photographic views and as written thereon at the time thereof not for the purposes of procuring a pension for the relator, but for compiling, so far as his case was concerned, an authentic surgical history of the war.

This evidence was not before the Secretary at the time of the prior and overruled decision of February 6, 1885.

8. And your relator avers that the said official decision of
6. the Secretary of the Interior, so made as aforesaid, was a final adjudication of his claim in his favor and conclusively establishes his right under the law to be rerated at $25 per month from June 6, 1866; $31.25 per month from June 4, 1872; $50 per month from June 4, 1874, and $72 per month from June 17, 1878, and to be paid the difference monthly between these sums and what had been allowed him, and all that remained for the then Commissioner of Pensions to do in the premises was the simple ministerial duty of accordingly carrying the said final official decision of the Secretary into execution.

9. But your relator says that the then Commissioner of Pensions, instead of performing the whole of his ministerial duty under the decision of the Secretary aforesaid by reissuing your relator's said certificate, with the increased ratings aforesaid, as provided by law for the disabilities your relator was so finally adjudged to have had from the time of the incurrence of his said wounds and injuries, reissued your relator's certificate at $50 per month from January 14, 1885, and while this ministerial duty was thus but partially performed the respondent succeeded to the office of Commissioner of Pensions and became thereby obligated and in duty bound to execute so much of the decision of the Secretary of the Interior as his predecessors in office had refused, neglected, or omitted to execute.

10. And your relator avers that it was and now is the simple

ministerial duty of the respondent as Commissioner of Pen-
7 sions, imposed by the said final judgment and decision of the Secretary permitting and suffering the respondent to exercise no choice nor discretion in the premises, to reissue to your relator his said pension certificate at $25 per month from June 6, 1866, $31.25 per month from June 4, 1872, $50 per month from June 4, 1874, and $72 per month from June 17, 1878, as provided by law for those persons who, while in the military or naval service of the United States and in the line of duty, have become so totally and permanently disabled as to require regular aid and attendance, and which said degree of disability your relator is finally adjudged to have by said decision.

But your relator alleges that the respondent as Commissioner of Pensions has refused and still refuses to so reissue your relator's said pension certificate or discharge the plain duty imposed upon him by the said official action and decision of the Secretary toward your relator, although requested so to do.

Wherefore your relator prays—

That the peremptory writ of mandamus may issue out of this honorable court, directed to the respondent, commanding him as Commissioner of Pensions to forthwith reissue to your relator his said pension certificate with the following rates: $25 per month from June 6, 1866; $31.25 per month from June 4, 1872; $50 per month from June 4, 1874, and $72 per month from June 17, 1878; and to allow him the monthly difference between these sums and what has been allowed him; and further ordering and commanding the respondent as Commissioner of Pensions to do what the law
8 requires him to do in all the premises.

And to this end your relator will ever humbly pray.

CHARLES R. MILLER.

J. G. BIGELOW,
Attorney for Relator.

DISTRICT OF COLUMBIA, *ss:*

I solemnly swear that I have heard read the foregoing petition by me subscribed and know the contents thereof; that the facts therein stated of my own knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

CHARLES R. MILLER.

Subscribed and sworn to this 9th day of November, A. D. 1889.

GEO. G. COLGATE,
Notary Public, D. C. [SEAL.]

9 *Order Referring Cause to General Term. Filed Nov.* 12, 1889.

In the Supreme Court of the District of Columbia the 12th day of November, 1889.

THE UNITED STATES *ex Relatione* CHARLES R. MILLER
vs.
GREEN B. RAUM, Commissioner of Pensions. } Mandamus. At Law. No. 30102.

On application of the relator, by Mr. J. G. Bigelow, his attorney, this cause is, this 12th day of November, 1889, certified to the general term of this court, to be heard there in the first instance.

W. S. COX, *J.*

Order for Respondent to Show Cause. Filed Nov. 18, 1889.

In the Supreme Court of the District of Columbia. General Term.

THE UNITED STATES *ex Relatione* CHARLES R. MILLER
vs.
GREEN B. RAUM, Commissioner of Pensions. } Mandamus. At Law. No. 30102.

10 On consideration of the petition filed herein and on motion of the relator, by Mr. J. G. Bigelow, his attorney, it is, this 18th day of November, 1889, ordered that the respondent show cause, if any he has, in this court on or before the 16th day of December, 1889, why the peremptory writ of mandamus should not issue against him as in the petition prayed, provided a copy of this order be served on the respondent on or before the 21st day of November, 1889.

E. F. BINGHAM,
Chief Justice.

Marshal's Return.

Served copies of the within order on Green B. Raum, Commissioner of Pensions, November 19th, 1889.

D. M. RANSDELL, *Marshal.*

Order for Appearance for Respondent. Filed Dec. 13, 1889.

In the Supreme Court of the District of Columbia the 13th day of December, 1889.

11 THE U. S. *ex Rel.* CHARLES R. MILLER
vs.
GREEN B. RAUM, Commissioner of Pensions. } At Law. No. 30102.

The clerk of said court will please enter my appearance for the respondent herein.

JNO. BLAIR HOGE,
Attorney for Respondent.

Stipulation Enlarging Time to Answer Rule. Filed Dec. 14, 1889.

In the Supreme Court of the District of Columbia.

THE UNITED STATES *ex Rel.* CHARLES R. MILLER
vs.
GREEN B. RAUM, Commissioner of Pensions. } At Law. No. 30102.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the time limited by the
12 order of the court for answering the rule to show cause in this case is hereby enlarged to and including the 20th instant.
Dec'r 14th, 1889.

J. G. BIGELOW,
Attorney for Relator.
JOHN BLAIR HOGE,
Attorney for Respondent.

Answer to Rule to Show Cause. Filed Dec. 20, 1889.

In the Supreme Court of the District of Columbia. In General Term, in the First Instance.

THE UNITED STATES *ex Rel.* CHARLES R. MILLER
vs.
GREEN B. RAUM, Commissioner of Pensions. } At Law. No. 30102.

Answer of the respondent to the rule to show cause.

For answer to the rule issued herein on the 18th day of November, A. D. 1889, requiring the respondent to show cause why the writ of mandamus should not issue herein, as in the relator's
13 petition prayed, this respondent says:

1st. That he is now and since the 19th day of October, A. D. 1889, has been the Commissioner of Pensions of the United States, and as such Commissioner is and during all of said time has been charged by law with the performance, under the direction of the Secretary of the Interior, of such duties in connection with the various pension and bounty land laws as may be prescribed by the President, and that in the practical administration of the affairs of the Pension Bureau he is and has been, if not by express direction of the President of the United States, still with his full knowledge, consent, and approbation, the ultimate judge in all questions arising in said bureau under said laws, subject only to the right of appeal on the part of any person deeming himself aggrieved by any decision of this respondent as such Commissioner to the Secretary of the Interior, and that, subject to such right of appeal, he is and during all of said time has been in manner aforesaid invested with full dis-

cretion and quasi-judicial power in determining such ques-
14 tions, and that these have been the functions, duties, and powers of all of respondent's predecessors in said office ever since the establishment thereof.

2d. That from the records of the Pension Bureau it appears that the relator has been borne on the pension-rolls of the United States and paid for many years as a pensioner at the several rates and from the several dates set forth in the 5th and 9th paragraphs of the petition herein; that said rates and the dates from which they were respectively payable have been, according to the said records, fixed by the several Commissioners of Pensions from time to time in the exercise of their lawful discretion in the execution of the several pensions laws applicable to relator's case.

3d. That there is no law and never has been prescribing for a disability of the character of that of the relator a specific rate of pension, and that in determining the rates of pension to which the relator was from time to time entitled the several Commissioners of Pensions, predecessors of this respondent, have had to deter-
15 mine and in the exercise of their lawful discretion have determined to what specific disability, the rate of pension for which was fixed by law, the unspecified disability of the relator was equivalent, and in the exercise of such lawful discretion they have fixed his rates of pension according to this standard of comparison.

4th. And respondent, further answering, says (protesting at the same time that in showing cause under the said rule he is under no duty to set forth the grounds and reasons upon which his administration of the pension laws or any of them has proceeded) that it is not true, as stated in relator's petition, that respondent has failed and refused to carry out the decision of the Secretary of the Interior made on the relator's appeal in the month of February, 1885, from the decision of the then Commissioner of Pensions, and respondent says that on the 6th day of February, A. D. 1885, the then Secretary of the Interior (the Honorable Henry M. Teller) decided that the action of the Pension Bureau was correct
16 in granting the relator a pension at the rate of $8.00 per month from August 27, 1865, the date of his discharge; of $15.00 per month from June 6, 1866; of $18.00 per month from June 4, 1872, and $24.00 per month from March 3, 1883, with the exception that his pension was improperly reduced on June 4, 1882, from $24.00 to $18.00 per month, and that from the last-mentioned date to March 3, 1883, the relator should be paid the difference between $24.00 and $18.00 per month; and respondent says that the said Secretary, in his said decision, says that he "is constrained to think that he (the relator) does not require regular aid and attendance within the meaning of the law."

And this respondent further says that true it is that afterwards, to wit, on the 12th day of February, 1885, and upon additional evidence the said Secretary did revise and review his said decision and did partially reverse and annul the same, holding, in these words, that "after a careful review of all the facts in this case the
17 Department is constrained to think that the pensioner comes

under the meaning of the law granting pensions to those persons who require regular aid and attendance.

The decision of the 6th instant is therefore overruled in so far as it denies that the pensioner requires regular aid and attendance;" which said decision, this respondent respectfully maintains, was a reaffirmance of the said decision of the 6th of February, 1885, in all other respects and particulars and must be understood to refer exclusively to the condition of the relator about the time the decision was made; and this respondent says that the said decision was so interpreted by the Pension Bureau, which did accordingly issue a new certificate to the relator at $24 per month from 4th June, 1882, and at an increase of $30 per month from 3d March, 1883, and at $50 per month from 14th January, 1885, this said last-mentioned date being the date of the physical examination of the relator by the medical officers of the Pension Bureau next preceding
18 the date of said decision of said Secretary of the Interior, which said action of the Pension Bureau was afterwards affirmed on the relator's appeal by Assistant Secretary of the Interior Hawkins.

5th. And respondent denies that the effect of the decision of the Secretary of the Interior of date February 12, 1885, referred to in the 7th paragraph of the petition herein, was to entitle the relator to the several rates of pension set forth in the 8th paragraph of said petition, but avers, on the contrary, that the effect of said petition was to entitle the relator to the several rates of pension in the 4th paragraph of respondent's answer particularly set forth, and that both this respondent and his predecessor in office, the Hon. John C. Black, who filled said office at the date of said decision, have in all respects conformed thereto.

6th. That the provision of law under which the relator
19 claims to be entitled to be carried on the pension-rolls and paid a pension at the rate of seventy-two dollars ($72) per month from June 17, 1878, is contained in the act of Congress approved June 16, 1880 (21 Stats. at Large, p. 281), the operation of which is limited to "all soldiers and sailors who are now (*i. e.*, at the date of said act) receiving a pension of fifty dollars per month ($50) under the provisions of an act" therein cited, whereas the relator, according to the showing of his own petition and in fact, was at that time only receiving a pension of $18.00 per month, which said rate had been theretofore fixed, as hereinbefore set forth, by the Commissioner of Pensions for the time being in the exercise of his lawful discretion in the premises.

7th. And this respondent, further answering, says that he is advised that it is beyond the province of this honorable court to revise or review the interpretation placed by him on said act of June
20 16, 1880, and this respondent conceives that it would be destructive of uniformity and productive of disorder for the judicial department of the Government to interfere in the administration of the complicated system of laws establishing and regulating pensions.

And now, having fully answered the said rule, this respondent

prays that the same may be discharged, and he be allowed to go hence without day and with his proper costs in this behalf most wrongfully sustained.

GREEN B. RAUM,
Commissioner of Pensions.

JOHN BLAIR HOGE,
Solicitor for Respondent.

DISTRICT OF COLUMBIA,
County of Washington, } *ss:*

Green B. Raum, being duly sworn according to law, on his oath says: I have read the foregoing answer by me subscribed as Commissioner of Pensions and know the contents thereof. The matters and things therein stated of my own knowledge are true, and those stated on information and belief I verily believe to be true.

GREEN B. RAUM.

21 Subscribed and sworn to before me this 20th day of December, A. D. 1889.

GREEN B. RAUM, JR.,
Notary Public. [SEAL.]

Motion by Relator for Peremptory Mandamus, &c. Filed Dec. 23, 1889.

In the Supreme Court of the District of Columbia. General Term.

THE UNITED STATES *ex Relatione* CHARLES R. MILLER
vs.
GREEN B. RAUM, Commissioner of Pensions.
} Mandamus. At Law. No. 30102.

And now comes the said relator and by Mr. J. G. Bigelow, his attorney, moves the court for the peremptory writ of mandamus against the respondent, notwithstanding his return to the rule to show cause; and the relator further moves for a speedy hearing of this his said motion on the grounds that the writ of mandamus is not a term, but a special remedial, writ, and is therefore entitled to an immediate hearing, and, further, because the tenure of office of the respondent is of uncertain duration.
22

J. G. BIGELOW,
Att'y for Relator.

Court Proceedings.

MONDAY, *October* 7, 1889.

Proceedings before the supreme court of the District of Columbia, sitting in general term, beginning first Monday, October 7th, 1889.

Present, presiding: Chief Justice Bingham and Justices ——.

* * * * * * *

MONDAY, *December* 23, 1889.

Session resumed pursuant to adjournment.
Present: Justices Hagner and James.

* * * * * * *

23 THE U. S. *ex Relatione* CHARLES R. MILLER *vs.* GREEN B. RAUM, Commissioner of Pensions. } Mandamus. At Law. No. 30102.

And now comes the said relator and by Mr. J. G. Bigelow, his attorney, moves the court for the peremptory writ of mandamus against the respondent, notwithstanding his return to the rule to show cause; and the relator further moves for a speedy hearing of this his said motion on the grounds that the writ of mandamus is not a term, but a special remedial, writ, and is therefore entitled to an immediate hearing, and, further, because the tenure of office of the respondent is of uncertain duration. Motion overruled.

By the court.
Dec. 23, '89.

24 *Order Granting Leave to Respondent to File Amendment to Answer. Feb'y 13th, A. D.* 1890.

In the Supreme Court of the District of Columbia. In General Term, in the First Instance.

THE UNITED STATES *ex Rel.* CHARLES R. MILLER *vs.* GREEN B. RAUM, Commissioner of Pensions. } At Law. No. 30102.

On motion of the respondent, by John Blair Hoge, Esqr., his attorney, it is by the court, this 13th day of February, A. D. 1890, ordered that the said respondent have, and he is hereby given, leave to file the amendment to his answer to the rule herein herewith exhibited. This order is passed with the assent of the petitioner.

By the court:

A. B. HAGNER.

25 *Amendment to Answer of Respondent to Rule to Show Cause. Filed Feb'y* 13, 1890.

In the Supreme Court of the District of Columbia. In General Term, in the First Instance.

THE UNITED STATES *ex Rel.* CHARLES R. MILLER *vs.* GREEN B. RAUM, Commissioner of Pensions. } At Law. No. 30102.

The respondent, by leave of the court first had and obtained, amends his answer heretofore filed to the rule to show cause issued herein by inserting after the word "certificate," in the tenth line

from the bottom of the 4th paragraph thereof, the words "signed by the Secretary of the Interior," and by adding to said paragraph the following matter, viz: "As will more fully and at large appear by reference to a copy of the decision of said assistant Secretary upon said appeal herewith filed, marked Exhibit G. B. R. No. 1, and made part hereof."

GREEN B. RAUM,
Commissioner of Pensions.

26 DISTRICT OF COLUMBIA, }
County of Washington, } ss:

Green B. Raum, being duly sworn according to law, on his oath says that he has read the answer to the rule to show cause in the above-entitled case by him subscribed as Commissioner of Pensions, as well as the above amendments thereto by him subscribed as such Commissioner; that the matters and things set forth in said answer as above amended of his own knowledge are true, and those stated on information and belief he verily believes to be true.

GREEN B. RAUM.

Subscribed and sworn to before me this 10th day of February, A. D. 1890.

GREEN B. RAUM, JR.,
Notary Public. [SEAL.]

EXHIBIT G. B. R. No. 1. Filed Feb. 13, 1890.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR, PENSION OFFICE,
27 WASHINGTON, D. C., *February 11th*, 1890.

I hereby certify that the accompanying pages, numbered from one to five, are truly copied from the original in the office of the Commissioner of Pensions.

GREEN B. RAUM,
Commissioner of Pensions.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *February 11th*, 1890.

Be it remembered that Green B. Raum, who has signed the foregoing certificate, was at the date of signing thereof Commissioner of Pensions, and that to his attestations as such full faith and credit are and ought to be given.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed the day and year first above written.

JOHN W. NOBLE,
Secretary of the Interior. [SEAL.]

28 DEPARTMENT OF THE INTERIOR,
BUREAU OF PENSIONS,
WASHINGTON, D. C., *July 28th*, 1886.

The Commissioner of Pensions.

SIR: Herewith are returned the papers which accompanied your report of April 21st, 1886, upon the appeal of Charles R. Miller, of this city, from the action of your office rating his pension certificate No. 55356, as late of Co. "B," 8th Ohio Vols.

It appears that this case was first appealed to the Department May 9th, 1884, at which time Mr. Miller alleged that he was and had been since discharge so much disabled by the gunshot wound of left leg as to require the regular aid and attendance of another person.

The papers were returned to your office with the following departmental letter:

"FEBRUARY 6TH, 1885.

"The Commissioner of Pensions.

29 "SIR: Herewith are returned the papers which accompanied your report of the 8th of September last upon the appeal of Mr. Charles R. Miller, of this city, from the action of your office in rating his pension certificate No. 55356.

"It appears from your report that Mr. Miller was pensioned at $8 per month from August 27th, 1865, the date of his discharge, on account of a gunshot wound of his left leg. His pension was increased to $15 per month, June 6, 1866; to $18 per month, June 4th, 1872, and to $24 from November 23d, 1881. It was reduced to $18 per month June 4th, 1882, and increased to $24 under the provisions of the act of March 3d, 1883.

"Mr Miller claims in his appeal that the pension should be rerated from the commencement, and it should be increased on the ground that he needs aid and attendance.

"The papers in this case have been carefully considered, and it is the opinion of the Department that the action of your office
30 in rating Mr. Miller's pension was proper, and that he is now and has been receiving all that he was entitled to under the law, except from June 4th, 1882, the date his pension was reduced from $24 per month to $18 per month. He should be allowed the difference between $18 and $24 from June 4th, 1882, to the 3d of March, 1883.

"The pensioner is greatly disabled, and it is evident from the papers in this case that he is utterly unable to do any manual labor, and he is therefore entitled to $30 per month under the act of March 3d, 1883, which has been allowed him by your office.

"The Department is constrained to think that he does not require regular aid and attendance within the meaning of the law.

"Very respectfully, H. M. TELLER, *Secretary.*"

Six days later a second letter was written in the case as follows:

"FEBRUARY 12TH, 1885.

"The Commissioner of Pensions.

31 "SIR: Herewith are returned the papers in the pension claim, certificate No. 55356, of Charles R. Miller.

"It appears from the papers that Mr. Miller's claim was before this Department on the 6th instant, and it was held that the pensioner is greatly disabled, and it is evident from the papers in his case that he is utterly unable to do any manual labor, and he is therefore entitled to $30 per month under the act of March 3d, 1883, which has been allowed him by your office.

"Since the departmental decision above referred to the papers in the claim have been carefully reconsidered by the Department and a personal examination of the pensioner made, and it satisfactorily appears that he is unable to put on his shoe and stocking on the foot of his injured leg for the reason that the 'nearest point that can be reached by hand from foot — 23 inches,' and for the further reason that from necrosis of the lower vertebra of spine, producing anchylosis of spinal column and destruction of some of the spinal

32 nerves, he is unable to bend his back.

"After a careful review of all the facts in this case the Department is constrained to think that the pensioner comes under the meaning of the law granting pensions to those persons who require regular aid and attendance.

"The decision of the 6th instant is therefore overruled in so far as it denies that the pensioner requires regular aid and attendance.

"Very respectfully, H. M. TELLER, *Secretary.*"

Upon the receipt by your office of the above-quoted letters a reissue of pension was granted at $24 per month from June 4th, 1882, at $30 per month from March 3d, 1883, and at $50 per month from January 14th, 1885.

From this action the appeal is taken, Mr. Miller claiming that under the decision of the hon. Secretary he should have been granted the highest rate of pensions allowed by law for per-

33 sons requiring regular aid and attendance from discharge to the present time.

After a careful consideration of all the papers in this case the Department is of the opinion that there is nothing in the evidence to show that Mr. Miller has been entitled to a higher rate of pension than that allowed by your office.

Very respectfully, D. L. HAWKINS,
Assistant Secretary.

Docket 580, 1885.

Court Proceedings.

MONDAY, *January 6th*, 1890.

Proceedings before the supreme court of the District of Columbia sitting in general term, beginning first Monday, January 6th, 1890

Present, presiding: —— ——.

* * * * * * *

28 DEPARTMENT OF THE INTERIOR,
BUREAU OF PENSIONS,
WASHINGTON, D. C., *July 28th*, 1886.

The Commissioner of Pensions.

SIR: Herewith are returned the papers which accompanied your report of April 21st, 1886, upon the appeal of Charles R. Miller, of this city, from the action of your office rating his pension certificate No. 55356, as late of Co. "B," 8th Ohio Vols.

It appears that this case was first appealed to the Department May 9th, 1884, at which time Mr. Miller alleged that he was and had been since discharge so much disabled by the gunshot wound of left leg as to require the regular aid and attendance of another person.

The papers were returned to your office with the following departmental letter:

"FEBRUARY 6TH, 1885.

"The Commissioner of Pensions.

29 "SIR: Herewith are returned the papers which accompanied your report of the 8th of September last upon the appeal of Mr. Charles R. Miller, of this city, from the action of your office in rating his pension certificate No. 55356.

"It appears from your report that Mr. Miller was pensioned at $8 per month from August 27th, 1865, the date of his discharge, on account of a gunshot wound of his left leg. His pension was increased to $15 per month, June 6, 1866; to $18 per month, June 4th, 1872, and to $24 from November 23d, 1881. It was reduced to $18 per month June 4th, 1882, and increased to $24 under the provisions of the act of March 3d, 1883.

"Mr Miller claims in his appeal that the pension should be rerated from the commencement, and it should be increased on the ground that he needs aid and attendance.

"The papers in this case have been carefully considered, and it is the opinion of the Department that the action of your office
30 in rating Mr. Miller's pension was proper, and that he is now and has been receiving all that he was entitled to under the law, except from June 4th, 1882, the date his pension was reduced from $24 per month to $18 per month. He should be allowed the difference between $18 and $24 from June 4th, 1882, to the 3d of March, 1883.

"The pensioner is greatly disabled, and it is evident from the papers in this case that he is utterly unable to do any manual labor, and he is therefore entitled to $30 per month under the act of March 3d, 1883, which has been allowed him by your office.

"The Department is constrained to think that he does not require regular aid and attendance within the meaning of the law.

"Very respectfully, H. M. TELLER, *Secretary.*"

Six days later a second letter was written in the case as follows:

"FEBRUARY 12TH, 1885.

"The Commissioner of Pensions.

31 "SIR: Herewith are returned the papers in the pension claim, certificate No. 55356, of Charles R. Miller.

"It appears from the papers that Mr. Miller's claim was before this Department on the 6th instant, and it was held that the pensioner is greatly disabled, and it is evident from the papers in his case that he is utterly unable to do any manual labor, and he is therefore entitled to $30 per month under the act of March 3d, 1883, which has been allowed him by your office.

"Since the departmental decision above referred to the papers in the claim have been carefully reconsidered by the Department and a personal examination of the pensioner made, and it satisfactorily appears that he is unable to put on his shoe and stocking on the foot of his injured leg for the reason that the 'nearest point that can be reached by hand from foot — 23 inches,' and for the further reason that from necrosis of the lower vertebra of spine, producing anchylosis of spinal column and destruction of some of the spinal

32 nerves, he is unable to bend his back.

"After a careful review of all the facts in this case the Department is constrained to think that the pensioner comes under the meaning of the law granting pensions to those persons who require regular aid and attendance.

"The decision of the 6th instant is therefore overruled in so far as it denies that the pensioner requires regular aid and attendance.

"Very respectfully, H. M. TELLER, *Secretary.*"

Upon the receipt by your office of the above-quoted letters a reissue of pension was granted at $24 per month from June 4th, 1882, at $30 per month from March 3d, 1883, and at $50 per month from January 14th, 1885.

From this action the appeal is taken, Mr. Miller claiming that under the decision of the hon. Secretary he should have been granted the highest rate of pensions allowed by law for per-

33 sons requiring regular aid and attendance from discharge to the present time.

After a careful consideration of all the papers in this case the Department is of the opinion that there is nothing in the evidence to show that Mr. Miller has been entitled to a higher rate of pension than that allowed by your office.

Very respectfully, D. L. HAWKINS,
Assistant Secretary.

Docket 580, 1885.

Court Proceedings.

MONDAY, *January 6th*, 1890.

Proceedings before the supreme court of the District of Columbia sitting in general term, beginning first Monday, January 6th, 1890

Present, presiding: —— ——.

* * * * * * *

34 MONDAY, *February* 17*th*, 1890.

Session resumed pursuant to adjournment.
Present: Justices Hagner & Cox. Mr. Justice James indisposed.

* * * * * * *

THE UNITED STATES *ex Relatione* CHARLES R. MILLER
vs.
GREEN B. RAUM, Commissioner of Pensions.
Mandamus. At Law. No. 30102.

This cause coming on to be heard on the petition, the rule to show cause, the return thereto by the respondent, and the motion of the relator for peremptory mandamus notwithstanding such return, and the same having been submitted to and duly considered by the court, it is thereupon by the court, this 17th day of February, 1890, adjudged, ordered, and decreed that said motion be, and the same hereby is, denied and the said petition be, and the same hereby is, dismissed with costs.

W. S. COX, *J.*

35 TUESDAY, *February* 18, 1890.

Session resumed pursuant to adjournment.
Present, presiding: Justices Hagner, James, & Cox.

THE UNITED STATES *ex Relatione* CHARLES R. MILLER
vs.
GREEN B. RAUM, Commissioner of Pensions.
Mandamus. At Law. No. 30102.

The relator having sued out a writ of error to the Supreme Court of the United States on the judgment of this court herein, of February 17, 1890, dismissing his petition, bond is hereby fixed in the penalty of one hundred ($100) dollars.

W. S. COX, *J.*

Bond. Filed Feb'y 19, 1890.

In the Supreme Court of the District of Columbia, the 18th day of February, 1890.

36 THE UNITED STATES *ex Relatione* CHARLES R. MILLER, Plaintiff in Error,
vs.
GREEN B. RAUM, Commissioner of Pensions, Defendant in Error.
In Error. No. 30102. At Law.

Know all men by these presents that we, Charles R. Miller, principal, and George Henderson and I. N. Hammer, sureties, are bound unto the above-named Green B. Raum in the sum of one hundred ($100) dollars, to be paid Green B. Raum, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 17th day of February, 1890.

Whereas the above-named Charles R. Miller has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if
37 the above-named Charles R. Miller shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CHARLES R. MILLER. [SEAL.]
GEORGE HENDERSON. [SEAL.]
I. N. HAMMER. [SEAL.]

Sealed and delivered in presence of—
J. G. BIGELOW.

Approved.
W. S. COX, *J.*

38 *Writ of Error to the Supreme Court of the United States.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between The United States *ex relatione* Charles R. Miller and Green B. Raum, Commissioner of Pensions, being No. 30102, at law, a manifest error hath happened, to the great damage of the said relator, as by his complaint appears; and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 19th day of February, in the year of our Lord 1890, and of the Independence of the United States the one hundred and fourteenth.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

39 *Citation to the Supreme Court of the United States.*

The United States of America to Green B. Raum, Commissioner of Pensions, Greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The United States *ex rel.* Charles R. Miller is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness Edward F. Bingham, chief justice of the said supreme court of the District of Columbia, in the year of our Lord one thousand eight hundred and ninety.

E. F. BINGHAM,
Chief Justice.

On this — day of ——, in the year of our Lord one thousand eight hundred and —, personally appeared before me, the subscriber, —— ——, and makes oath that he delivered a true copy of the above citation to —— ——.

—— ——.

Service acknowledged this 19th day of February, A. D. 1890.
JNO. BLAIR HOGE,
Att'y for Respondent.

40 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 24 day of February, 1890.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk,*
By J. R. YOUNG,
Assistant Clerk.

Justice's Certificate.

I, E. F. Bingham, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 24 day of February, 1890.

E. F. BINGHAM, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that E. F. Bingham, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 24 day of February, 1890.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

[Endorsed:] Authentication of record.

Endorsed on cover: Dist. of Columbia supreme court. No. 1572. The United States *ex rel.* Charles R. Miller, plaintiff in error, *vs.* Green B. Raum, Commissioner of Pensions. Filed February 26, 1890.

APR 2 1890

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

Mandamus. No. 1572.

THE UNITED STATES Ex Relatione CHARLES R. MILLER, Plaintiff in Error,

vs.

GREEN B. RAUM, Commissioner of Pensions, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF AND ARGUMENT IN BEHALF OF PLAINTIFF IN ERROR.

J. G. Bigelow,
Attorney for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

Mandamus. No. 1572.

THE UNITED STATES EX RELATIONE CHARLES R. MILLER, PLAINTIFF IN ERROR,

vs.

GREEN B. RAUM, COMMISSIONER OF PENSIONS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF OF PLAINTIFF IN ERROR.

For a statement of the case I beg to refer the Court to my brief in the court below, pages 1 to 9, filed herewith as a part of my argument in behalf of the plaintiff in error.

I will add to what is there said that this same cause against John C. Black, Commissioner of Pensions, was before this Court at the October term, 1888, on writ of error to the court below, predicated on the refusal of that court to grant the relator's motion for the alternative writ, or for a rule to show cause.

The averments of the petition herein are precisely the same as in the previous petition, save that certain typographical errors that had crept into the former record are now corrected, and save, further, that the averments of paragraph 7 of the petition herein (R. 3) more fully set forth the additional evidence upon which Secretary Teller rendered the decision in question overruling his prior decision of February 6, 1885.

The cause was then heard as if upon demurrer to the petition, and this Court reversed the lower court, directing the granting of the said motion (128 U. S., 50). The judgment of this Court so reversing the court below was pronounced October 22, 1888. On the first day of November following the lower court, in obedience to the mandate of this Court, allowed the relator's said motion and issued the rule against Black to show cause, but failed to render any judgment upon the motion of the relator for the peremptory mandamus, notwithstanding the answer, until the 18th day of February, 1889, just two weeks before the inauguration of the present administration of the Federal Government, when that court dismissed the petition in an oral opinion by Justice Hagner, overruling, in my judgment, this Court.

It thus took the lower court three months and eighteen days to decide what they would do in the very case in which this Court had already clearly decided every question raised by Black's answer, which, like that of the respondent herein amounted to but a demurrer to the petition; and when it was perfectly apparent that the relator could not possibly sue out another writ of error to this Court to reinstate its judgment already in the case, before Black would vacate his office and the suit abate, dismissed the relator's petition in an oral opinion proceeding on grounds every one of which had been expressly overruled in the very case by this Court. And this poor Union soldier, whose utterly helpless physical condition results, not from disease that flesh is heir to whether in the army or out of it, but from gunshot wounds

received in battle—causes open to ocular demonstration—was mulcted in all the costs and expenses of that suit, besides being, for a whole year, unjustly and unlawfully deprived of nearly $8,000 arrears of pension to which he has a vested right and title under the said decision of Secretary Teller.

The relator reinstituted the suit against the respondent. There was no other alternative left him. The court below had overruled this Court in this case against Black, and the respondent, thus encouraged, refused to reissue the relator's certificate according to the said decision of the Secretary and the opinion and decision of this Court.

Upon filing his petition herein the relator moved for a rule to show cause upon the mandate of this Court in the case against Black. After a week's deliberation the court below concluded to obey the mandate and granted the motion, giving the respondent from the 19th November to the 16th December to show cause, if any he had, why the peremptory mandamus should not issue as prayed by the relator. At the request of the respondent I extended the time to the 20th December, on which date the respondent filed his return to the rule, which, in substance, is the same as the prior return of Black.

On December 23, 1889, the relator filed his motion for the per-emptory mandamus notwithstanding respondent's answer and moved for a speedy hearing of that motion.

The court endorsed thereon " Motion overruled " (R. 10), without specifying which motion was intended to be overruled—the one for the peremptory writ or the motion for a speedy hearing of that motion. Nor was the relator able to get the court to take up his motion for the peremptory mandamus and decide the same until February 17 following (R. 14), on which day the court below again overruled this Court in an oral opinion by Justice Cox, dismissing the petition, with costs, but on altogether different grounds.

The following assignment of errors embody the actual rulings of the court below in the two oral opinions mentioned of Justices Hagner and Cox:

ASSIGNMENT OF ERRORS.

1. Secretary Teller decided that the relator "*comes under the meaning of the law granting pensions to those persons who require regular aid and attendance*" (R. 3). This Court decided in this case against Black with reference thereto that "*so far as respects the matter decided there is no discretion or exercise of judgment left.*" (128 U. S., 52.)

The court below, reversing the Secretary and overruling this Court, held that the relator did *not* "*come under the meaning of the law granting pensions to those persons who require regular aid and attendance,*" but under section 4698½, Revised Statutes. In this the court erred as to its judicial power in the premises.

2. The court below erred in expressly holding that it made no difference whether Miller, the plaintiff in error, was kept off the pension-roll at $50 per month prior to June 16, 1880, by the fraud or official misconduct of the Pension Bureau or through his own neglect; that it was sufficient that he was so kept off the roll to make his a case of *casus omissus* under the act of that date and to debar him, under the amendatory arrears of pensions act of March 3, 1879, from all arrears of pension on account of his back injury, thus again overruling this Court and reversing Secretary Teller.

3. The court, in computing the arrears of pension due the relator under the Secretary's said decision, erred in undertaking to trace the computation backward from the last act, that of June 16, 1880, to the date of his discharge instead of commencing at the date of his discharge and tracing the case from thence, under the law, from time to

time, until now, as directed in the said amendatory act of March 3, 1879, and in holding that because Miller was not on the roll on June 16, 1880, at $50 per month he could not be increased by the act of that date to $72 per month from June 17, 1878, thus again overruling this Court and reversing the Secretary.

4. The relator need not have been on the pension-roll at all on June 16, 1880. It is plainly sufficient to have filed his application with the Commissioner of Pensions prior to July 1, 1880, to entitle him, under the said decision of the Secretary, to the rates of pension claimed in the petition, and it was manifest error in the court below not to have so ruled.

5. The court erred in holding that Assistant Secretary Hawkins had authority to reverse the decision in question of Secretary Teller and divest the relator of his vested rights thereunder, and further erred in expressly holding that the Assistant Secretary had the authority to do so, though it be in the absence of the convincing evidence upon which Secretary Teller acted, to wit, the evidence of his own eyes, and without affording the relator an opportunity to be heard in his own behalf, thereby refusing to be governed by the repeated decisions of this Court to the contrary, to which their attention was called.

6. The court below erred in expressly holding that Assistant Secretary Hawkins had, by his pretended decision of July 28, 1886 (R. 12 and 13), relieved the Commissioner of Pensions of the ministerial duty of carrying out the decision in question of Secretary Teller, thereby overruling this Court, not only in this case, but in the case of Kendall *vs.* Stokes, 12 Pet., 612, 613, to which their attention was called.

7. The court erred in holding that while a mandamus will lie to compel the Commissioner of Pensions to carry out

the Secretary's decision it will, nevertheless, lie only to compel him to carry out such decision according to his own judgment and discretion, and not according to the legal intendment thereof, thereby overruling every judgment ever rendered by any court in the history of the law awarding peremptory mandamus.

8. The court erred in holding that while the Commissioner of Pensions had not carried out the decision of the Secretary in question according to its true legal intendment, he had, nevertheless, carried it out according to his own judgment and discretion; and Assistant Secretary Hawkins having endorsed such judgment and discretion, the writ of mandamus is defeated and the vested rights of the relator successfully sported away.

9. This court held "*this case differs materially from numbers* 991 *and* 992," the cases of Dunlap and Rose (128 U. S., 50). The court below, overruling this Court, decided that this case and that of Dunlap are precisely alike and accordingly dismissed the relator's petition.

In this the court committed the double error of overruling their judicial superior and holding there is no difference between two cases that with respect to mandamus are wholly unlike.

10. The respondent not having traversed a single allegation of the petition, the court below erred in not holding that his answer amounted to nothing more than a demurrer to the petition, raising only the very questions of law that had already been argued before and decided by this Court in favor of the relator and in not granting peremptory mandamus in accordance with the judgment in the case of this Court.

ARGUMENT.

I.

The first six errors assigned set forth the rulings of the court below in the case against Black as actually made in the oral opinion delivered by Justice Hagner February 18, 1889. I had resolved that when this case should come on again for a hearing against the respondent the court below, if it should again overrule this Court and dismiss the petition, should do so on other grounds than those on which their former judgment proceeded, so I wrote the brief entitled in the cause in the court below, and therein will be found the said alleged errors discussed. To this discussion I here and in this connection call the attention of this Court. Beginning at the top of page 10 and continuing thence to the end of the argument, all there is of the facts and the law of this case will be found.

I will add here to what is there said that the question what cases are *casus omissus* under the act of June 16, 1880, does not necessarily arise in this case, for a case that "*comes under the meaning of the law granting pensions to those persons who require regular aid and attendance*" *cannot be casus omissus under that law.* I take this to be a plain proposition, though the court below failed to see it in that light.

But if the Court will indulge me for a moment I will point out the cases that can receive no benefits under that act. By sections 3 and 4 of the act of March 3, 1873, and by the act of June 18, 1874 (brief below, 11 and 12), all persons who were so totally and permanently disabled in the service as to require the regular aid and attendance of another person are granted a pension of $25 per month from June 6, 1866; $31.25 from June 4, 1872; and $50 per month from June 4, 1874, no matter whether such disability resulted from total blindness, the loss of both hands, or from

any other cause. By the act of June 17, 1878, the persons thus disabled from the specified causes of total blindness, the loss of both hands, or the loss of both feet are singled out from all other persons equally disabled from other cause or causes, and the rate of pension as to them is thereby increased to $72 per month. To remedy this defect and to restore the former equality Congress passed the act of June 16, 1880. The act accomplishes its purpose as to all cases of *permanent* disability of the specified degree requiring regular aid and attendance, in which the application was filed prior to July 1, 1880, so as to be within the terms of the arrears of pension act; but there are certain cases of progressive disability that come under section 4698½ Revised Statutes, mostly of disease, and particularly of rheumatism, that have *progressed* into this condition of helplessness since the passage of the act of June 16, 1880. All such cases are *casus omissus* under that act; and although the second section of that act provides that "all pensioners whose pensions shall be increased by the provisions of this act from fifty dollars per month to seventy-two per month shall be paid the difference between said sums monthly from June seventeenth, eighteen hundred and seventy-eight, to the time of the taking effect of this act," not all persons on the roll at the date of the passage of the act at $50 per month had their pensions thereby increased to $72 per month from June 17, 1878. A case of progressive disability that had progressed into this condition of helplessness after June 17, 1878, but prior to June 16, 1880, would be increased to $72 per month from the date of the $50 certificate.

This act of June 16, 1880, must be taken and construed with other provisions of the pension system; and the law does not contemplate granting a pension prior to the actual disability, nor a pension for a specified degree of disability prior to its existence in such degree.

All this, however, is outside of the questions involved in this case, as before stated.

Secretary Teller decided that the relator's case "*comes under the meaning of the law granting pensions to those persons who require regular aid and attendance.*" The law specifies in plain language the rate of pension from time to time in such a case; and this Court has already decided that mandamus is the proper remedy to be invoked to compel the Commissioner to carry out this decision. The only question, therefore, is, Has the decision been carried out? If it has not been, then, by the judgment of this Court, peremptory mandamus must issue.

In order to make the case perfectly clear, let us suppose that Secretary Teller had added to his decision the following words: "*And the Commissioner of Pensions will accordingly reissue the pensioner's certificate at* $25 *per month from June* 6, 1866; $31.25 *from June* 4, 1872; $50 *from June* 4, 1874, *and* $72 *per month from June* 17, 1878, *first deducting therefrom all pension allowed him for his leg injury.*" Would it then have been the ministerial duty of the Commissioner to have so reissued his certificate? But such *addendum* would have been declaratory only of the plain legal intendment of the decision and would have added nothing to the obligatory character thereof, for no case can "*come under the meaning of the law granting pensions to those persons who require regular aid and attendance*" unless the pensioner is entitled to these rates, and the law providing them is couched in such plain and precise language as to interpret its own meaning.

Calling the attention again of the Court to the brief in the case in the lower court, in which the return of the respondent to the rule is considered paragraph by paragraph, and its insufficiency to take the case of the relator as made by the petition from under the judgment of this Court at the last term is pointed out, I pass to the consideration of the errors predicated upon the rulings of the court herein in the oral opinion by Justice Cox from 7 to 10, inclusive.

II.

The court below, in view of the matters contained in my brief, designed especially to exhibit the utter absurdity of the grounds upon which they had dismissed the relator's petition against Black, concluded to dismiss his petition against the respondent upon altogether different grounds.

I propose now to examine these new grounds and to show that they are, if possible, still more absurd. The 7th, 8th, 9th, and 10th assignments of errors embody the rulings of the court as actually made in dismissing the relator's petition against the respondent. I will take them up in their order:

First. The court, not deeming it prudent to openly reverse this Court, frittered away, nevertheless, its judgment by holding that while mandamus will lie to compel the Commissioner to carry out the Secretary's decision, it will not lie to compel the carrying out of that decision according to its legal intendment, but only according to the judgment and discretion of the Commissioner, and, as the answer sets forth that the decision in question has been so carried out, mandamus is defeated.

Strange as it may seem, it is, nevertheless, true that this is one of the reasons given by the court for refusing mandamus and dismissing the relator's petition. The proposition is so manifestly absurd that great difficulty is experienced in controverting it. We occasionally meet with such propositions. And on this occasion I will content myself by stating two contrary propositions that are self-evidently true, namely, first, no court in the history of the law ever issued the peremptory writ of mandamus against an individual or corporation requiring the performance of a given duty without requiring the performance thereof according to the requirements of law as understood by the court issuing the mandamus; second, no court in the history of the

law ever issued the peremptory writ of mandamus requiring an inferior to carry out the decision of a superior authority without requiring such decision to be carried out according to its true legal intendment as understood by the court issuing the mandamus. If you strike down these two propositions, then the proposition that mandamus will cease to be a remedy in any case becomes self-evidently true, and the judgments of this Court may be frittered away at the arbitrary discretion of the inferior courts. If mandamus will lie to compel the Commissioner of Pensions to carry out the decision of the Secretary in question—and it has been so decided by this Court, if a court ever decided anything—then the writ will lie to compel the Commissioner to carry out the decision according to its true legal intendment. Anything short of this is *not* a carrying out of the decision.

Second. The Court further held that, the Commissioner of Pensions having carried out the decision, not according to its legal intendment, but according to his arbitrary judgment and discretion, and having been sustained in so doing by Assistant Secretary Hawkins, mandamus was defeated, and the relator successfully defrauded out of his rights thereunder.

This is quite a startling proposition. It was, nevertheless, held to be the law by the court below, and that, too, notwithstanding the repeated contrary decisions of this Court, to which the attention of the lower court was drawn. This same defense against mandamus was made by Postmaster General Kendall, and this Court disposed of it as follows:

"The solicitor did examine and decide that there was due the relators one hundred and sixty-one thousand five hundred and sixty-three dollars and ninety-three cents. Of this sum the Postmaster General credited them with one hundred and twenty-two thousand one hundred and one dollars and forty-six cents, leaving due the sum of thirty-nine thousand four hundred and seventy-two dollars and forty-seven cents, which he refused to carry to their credit, and the object of

the mandamus was to compel him to give credit for this balance.

"Under this law the Postmaster General is vested with no discretion or control over the decision of the solicitor, nor is any appeal or review of the decision provided for by the act. The terms of the submission were a matter resting entirely in the discretion of Congress, and if they thought proper to vest such power in any one, and especially as the arbitrator was an officer of the Government, it did not rest with the Postmaster General to control Congress or the solicitor in that affair. It is unnecessary to say how far Congress might have interfered by legislation after the report of the solicitor. but if there was no fraud or misconduct in the arbitrator, of which none is pretended or suggested, it may well be questioned whether the relators had not acquired such a vested right as to be beyond the power of Congress to deprive them of it." (12 Peter, 611.)

And further along in the opinion this Court said:

"It was urged at the bar that the Postmaster General was alone subject to the direction and control of the President with respect to the execution of the duty imposed upon him by this law, and this right of the President is claimed as growing out of the obligation imposed upon him by the Constitution to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this Court. It would be vesting in the President a dispensing power which has no countenance for its support in any part of the Constitution, and is asserting a principle which, if carried out in its results to all cases falling within it, would be clothing the President with a power to control the legislation of Congress and paralyze the administration of justice." (*Id.*, 612, 613.)

If I should add here that there is no power on earth, aside of the relator himself, that can relieve the Commissioner of Pensions from carrying out the decision of Secretary Teller, on which the petition for the writ is predicated, I would be fully sustained by the judgment of this Court in this case of Kendall *vs.* Stokes *et al.*

But let us go to the record and see what Hawkins did decide.

After I had filed my motion for peremptory mandamus, notwithstanding the answer (R. 10), and after I had furnished the respondent with a copy of my brief herewith filed, on the 13th February, acting upon the suggestion found therein at page 26, the respondent applied to the court to amend his return (R. 10), and procured the desired order to do so. The amendments will be found in the record at pages 10, 11, 12, and 13. At pages 12 and 13 will be found the decision, if it may be so called, of Assistant Secretary Hawkins; but the amendment fails to set out Miller's appeal, and all this Court can know about it is what Hawkins has therein said, namely, that he claimed, "under the decision of the Honorable Secretary, he should have been granted the highest rate of pensions allowed by law for persons requiring regular aid and attendance from discharge to the present time."

I presume that Miller made such a claim, as that is just what Secretary Teller's decision did give him and in language so plain that no one (not even Hawkins himself, as it appears) could fail to so understand it.

Hawkins, after setting out the decision of February 6 and the overruling decision in question of February 12, 1885, and stating, as above, the claim that Miller made in his appeal, concludes his letter of July 28, 1886, as follows:

"After a careful consideration of all the papers in this case, the Department is of the opinion that there is nothing in the evidence to show that Mr. Miller has been entitled to a righer rate of pension than that allowed by your office."

He says not a word about the rate of pension as *allowed* by Secretary Teller's decision, nor whether Miller would receive the rate of pension as claimed if that decision were carried out, but, decides that, the relator is entitled to receive no "*higher rate of pension than that allowed by your office*"—the Pension Bureau.

The decision of Hawkins was not at all responsive to the appeal as by him stated, but was a gratuitous reversal on his part of the decision of Secretary Teller in question. Such is unquestionably the effect of his decision. Whether Hawkins had sufficient sense to know that he possessed no such authority or whether he was actuated by malice in the matter is of no consequence here.

I make no question about Hawkins, Assistant Secretary, overruling or reversing Teller, the head of the Department, for the Assistant Secretaries execute, along with the Secretary, the functions of one and the same office, and I treat the letter or decision of Hawkins as if it were the Secretary himself speaking. In other words, I treat the letter as an act of the Department rather than of the incumbent of the office of Assistant Secretary.

The question then presents itself whether the head of the Department of to-day can reverse or overrule the decision of the head of yesterday, and, in the language of Chief Justice Marshall in the great case of Marbury *vs.* Madison, 1 Cranch, 166, "at his discretion sport away the vested rights" of the relator. The court below held that he could and so decided in the face of the decisions of this Court to the contrary and the contrary decisions of the Court of Claims and various contrary opinions of the Attorneys General, all of which were brought to their attention at the hearing hereof against Black. I will let it suffice now to cite but one decision of this Court on this question. I refer to the case of The United States *vs.* The Bank of Washington, 15 Peter, which directly involved the question of the authority of the head of a department to overrule the decisions of his predecessor in office.

On this question, at pages 400 and 401, this Court decided:

"The third instruction asked the Court to say, among other things, if the credits given by Mr. Barry were for extra allowances which the said Postmaster General was not

legally authorized to allow, then it was the duty of the present Postmaster General to disallow such items of credit. The successor of Mr. Barry had the same power and no more than his predecessor and the power of the former did not extend to the recall of credits or allowances made by Mr. Barry if he acted within the scope of his official authority given by law to the head of the Department. This right in an incumbent of reviewing a predecessor's decisions extends to mistakes in matters of fact arising from errors in calculation and to cases of rejected claims in which material testimony is afterwards discovered and produced. But if a credit has been given or an allowance made, as these were, by the head of a Department and it is alleged to be an illegal allowance the judicial tribunals of the country must be resorted to, to construe the law under which the allowance was made and to settle the rights between the United States and the party to whom the credit was given. It is no longer a case between the correctness of one officer's judgment and that of his successor. A third party is interested, and he cannot be deprived of a payment on a credit so given, but by the intervention of a court to pass upon his right."

The court below held that this was not good law in the case of the relator, and that Assistant Secretary Hawkins was at liberty, on his own motion, to review and overrule the decision in question of Secretary Teller and to strike down his vested rights thereunder to ~~merely~~ *near*ly $8,000 arrears of pension and a monthly increase of $22.

Secretary Teller, by the decision in question, overruled his prior decision of February 6, rejecting the claim of the relator made in his appeal from the action of the Pension Bureau, but he did this upon *additional* and *material* evidence, as set forth in the decision and paragraph 7 of the petition (R., 2 and 3), namely, the *evidence of his own eyes upon "a personal examination of the pensioner,"* and the five original photographic views of his injuries of back and leg, taken by the Army Medical Museum nearly twenty years prior thereto and at about the date of his discharge from the military service.

It will occur to the Court that this is the best possible evidence the Secretary could have on which to predicate his judgment. By it he was justified, by the above decision of this Court, in overruling his prior decision of February 6 and in allowing the claim of the relator.

But what evidence did Assistant Secretary Hawkins have before him July 28, 1886, when he overruled the decision in question of Secretary Teller and reinstated the overruled decision of February 6? (R., 12 and 13.) Did he have the same, more, or less evidence before him than that upon which the decision in question was predicated and by him overruled? The Assistant Secretary answers these questions himself. He says: "*After a careful consideration of all the papers in the case the Department is of the opinion that there is nothing in the evidence to show that Mr. Miller has been entitled to a higher rate of pension than that allowed by your office*"—the Pension Office. He makes this overruling decision in the face of the declaration by Secretary Teller that his judgment is based upon "*a personal examination of the pensioner.*" In other words, the Assistant Secretary overrules the Secretary in the absence of the *very evidence*, to wit, *the evidence of the eyes*, that convinced the head of the Department that Miller's claim ought to be allowed.

Such official conduct on the part of Assistant Secretary Hawkins needs no characterization from me in this Court. It stands already condemned by the decisions of this Court and the law of the land.

The respondent, by leave of the court, further amended his answer by adding after the word "certificate," in the 4th paragraph, the words "signed by the Secretary of the Interior," so as to make the paragraph read in this connection: "And the respondent says that the said decision was so interpreted by the Pension Bureau, which did accordingly issue a new certificate *signed by the Secretary of the Interior*," &c.

If it was the intention of the respondent to rely for his de-

fense upon the fact that the Secretary signed the certificate in question, and thereby endorsed and ratified the action of the Commissioner, that fact is not well pleaded. The respondent should have set out the date of the certificate and averred by what Secretary the same was signed, and that the Secretary so signing the same did so with the intention to overrule the decision in question and to ratify the action of the Pension Office, and should have filed along with his answer a duly exemplified copy of the certificate.

The facts are that neither of the certificates of the relator are signed by the Secretary, but by the Assistant Secretary, and, like all other pension certificates, signed in a perfunctory manner.

This Court will take judicial notice of how the affairs of the Pension Bureau are conducted under the law, and that from 2,000 to 4,000 pension certificates issue and reissue per week, and that those certificates issue directly from the Pension Bureau without going to the Department and without being signed by the Secretary or Assistant Secretary otherwise than by their stencils, that are kept at that bureau for that purpose. The thing that gives credit to a pension certificate is the departmental seal, and this, too, is impressed thereon at the Pension Office.

But suppose that the successor of Secretary Teller had actually signed the certificate, and had done so not in a perfunctory way, but with the deliberate purpose of overruling the decision in question, the case then reverts right back to this question of authority or power of the incumbent to overthrow the decisions of his predecessor, and comes again under the ban of the decision of this Court above referred to.

Again, this Court herein against Black held that "*the appellate tribunal in the present case is the Secretary of the Interior, who has no power to enforce his decisions by mandamus or any process of like nature*" (128 U. S., 52). The court below, in effect, ruled that, although this be so, the successor of Secretary Teller can, nevertheless, by the writ of injunction per-

petually enjoin the Commissioner of Pensions from carrying out the decision in question, and that the decision of Assistant Secretary Hawkins set out in the amended return amounts to such a perpetual injunction; and they thought it strange that I should reason to the contrary and maintain that if, on the one hand, the Secretary had "*no power to enforce his decisions by mandamus or any process of like nature*," on the other, he had *no power to issue an injunction or any process of like nature perpetually restraining the Commissioner from carrying out the decision in question.* I leave it for this Court to decide whether I am right or wrong.

Third. This Court decided that "*this case differs materially from*" that of Dunlap and Rose (128 U. S., 50). In my brief below against the respondent, and filed herewith, I undertook to point out that difference myself, at pages 40, 41, and 42, to which attention is called; but the court below, overruling this Court, held that there was no difference at all, and proceeded to dismiss the petition on the judgment of this Court in that case, making free use of what this Court had therein said as reasons for refusing the relator's motion for peremptory mandamus.

I possess no power of language to more clearly define the difference, with respect to the application of mandamus, between the Dunlap case and the case at bar, than the same is made to appear by the opinion of Mr. Justice Bradley in the cases, nor do I believe anybody else possesses the power to do so. By that opinion the reasons why a mandamus will *not* lie in the Dunlap case and why it *will* lie in the case of the relator are set forth with the greatest possible clearness. I can but refer the Court to that opinion.

Fourth. In the tenth and last assignment of errors it is claimed that the court below erred in not holding that the return of the respondent amounted to nothing more than a demurrer to the petition, raising no question of fact, but

only of law, and, the law having already been settled by this Court in favor of the relator, in not granting peremptory mandamus as in the petition prayed.

This same case came before this Court at the October term, 1888. It was brought up on writ of error to the court below, refusing the relator's motion for the alternative mandamus or rule to show cause. 'It is true that the respondent, Commissioner Black, had made no return or answer to the petition, and it is also true that the case was heard here only on such motion; but it was, nevertheless, heard as if on demurrer to the petition. The entire field of legal defenses to the petition was then urged against the granting of the motion.

Every possible legal defense which a trained judicial mind could invent or which a distinguished member of this bar—a lawyer who has had more experience in defending suits for mandamus against executive Federal officers than any other person living—the Honorable William A. Maury, Assistant Attorney General, could devise was then and there made to defeat the relator's said motion, and yet all these legal defenses were by this Court overruled, the court below reversed, and the motion granted. This all appears from the opinion of this Court.

And now how does this case come back here? Does it present any other than questions of law? Is there a single defense not of law made in the respondent's answer? Does the answer suggest any new or additional defenses? Does the return deny a single allegation of the petition or traverse a single averment therein? Does it set up any fact inconsistent with the averments of the petition? Not one.

The case comes back here to be heard again upon absolutely the same questions that were raised, argued, heard, and decided by this Court in favor of the relator at the last term. The Court then decided that mandamus was the proper remedy to be invoked to compel the Commissioner of Pensions to carry out the decision of the Secretary, and

that decision stands *unimpeached* by any defense made in the answer. AND THIS IS THE END OF THE CASE. Peremptory mandamus must issue, as in the petition prayed, or the judgment of this Court already in the case must be overruled or utterly disregarded. There was absolutely nothing for the court below to decide. All they were required to do was to issue the peremptory writ according to the opinion of this Court.

For these reasons I respectfully submit that the court below ought to be reversed, the prior judgment of this Court adhered to, and the peremptory writ of mandamus granted as by the relator in his petition prayed.

J. G. BIGELOW,
Attorney for Plaintiff in Error.

Supreme Court U.S.
October Term 1889.

In Error to the

Supreme Court, District of Columbia.

IN GENERAL TERM.

Mandamus. At Law. No. ~~30102~~ 1547

THE UNITED STATES *Ex Relatione* CHARLES R. MILLER

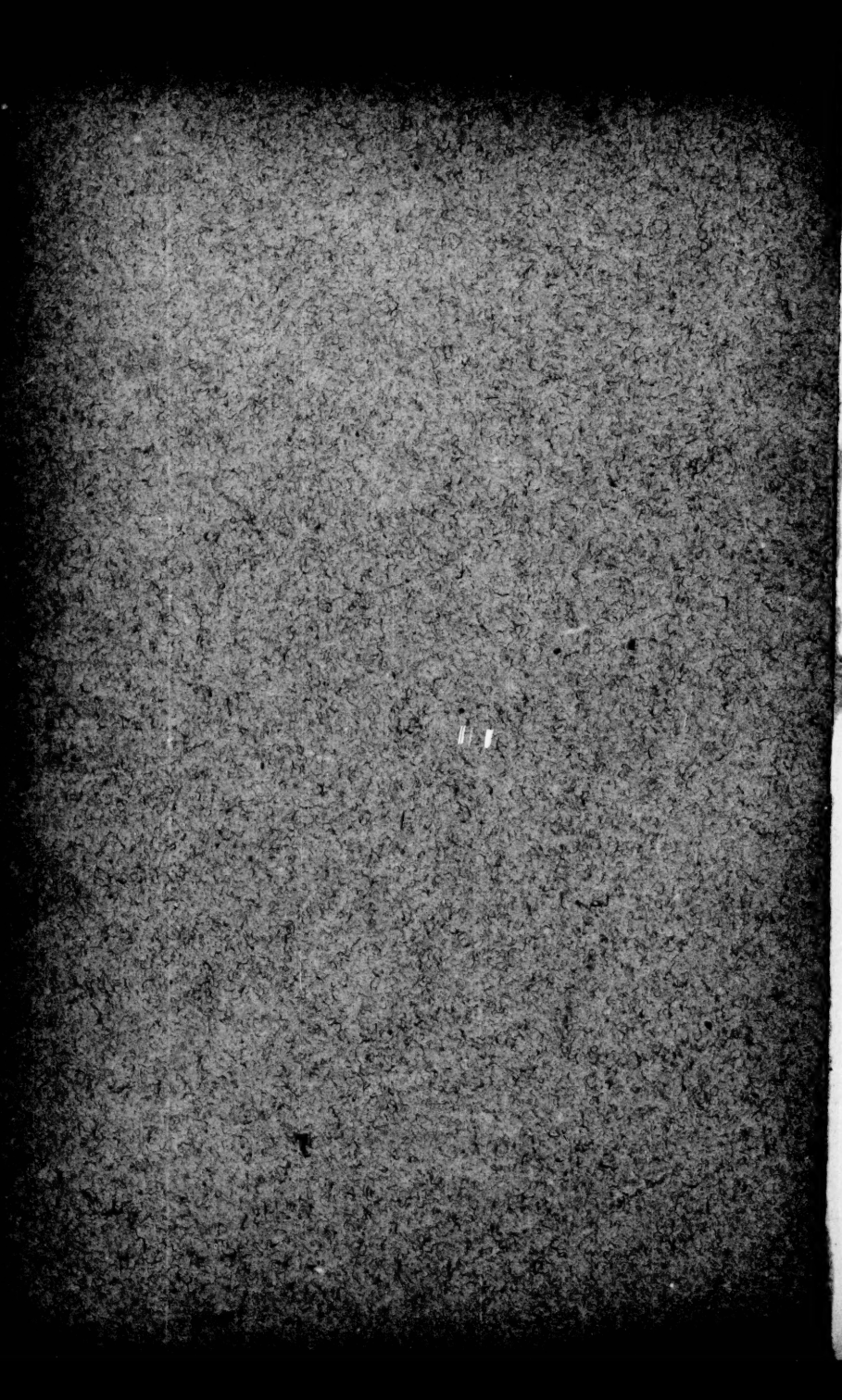
vs.

GREEN B. RAUM, COMMISSIONER OF PENSIONS.

Brief and Argument on Relator's Motion for Peremptory Mandamus, notwithstanding Respondent's Return.

J. G. BIGELOW,
Attorney for Relator.

JUDD & DETWEILER, PRINTERS.



IN THE

Supreme Court, District of Columbia.

IN GENERAL TERM.

Mandamus. At Law. No. 30102.

THE UNITED STATES *Ex Relatione* CHARLES R. MILLER

vs.

GREEN B. RAUM, COMMISSIONER OF PENSIONS.

THE CASE.

On November 11, 1889, the relator exhibited his petition in this court for the writ of mandamus against the respondent, as Commissioner of Pensions, and in substance alleged:

1. That he is a citizen of the United States, temporarily domiciled in the District of Columbia, and that he brings this suit in the name of the United States in his own behalf for the writ of mandamus against the respondent.

2. That the respondent is also a citizen of the United States and is the Commissioner of Pensions, and as such is sued.

3. That he served in Company D, 8th Ohio Cavalry, in the late war of the rebellion; that while so serving, and in the line of duty, he sustained, in battle, such wounds and injuries as resulted, at the time thereof, in his total and permanent helplessness; that his said wounds and injuries resulted in necrosis of the lower vertebræ of the spine, followed by anchylosis of the spinal column, the necrosis of the bones of his left leg and foot, followed by anchylosis of the left knee, ankle, and toes of the left foot, and great atrophy of the entire limb, whereby he became, was, and still is so totally and permanently disabled as to be rendered utterly helpless or so nearly so as to require the regular personal aid and attendance of another person.

4. That he was discharged from said service August 27, 1865, and that the law in plain and precise terms provides the following rates of pension for his said degree of disability, namely: $8 per month from date of discharge; $25 per month from June 6, 1866; $31.25 per month from June 4, 1872; $50 per month from June 4, 1874, and $72 per month from June 17, 1878, provided application therefor had been made to the Commissioner of Pensions at any time prior to July 1, 1880, and he made such application immediately upon his discharge from said service as aforesaid.

5. But that the Bureau of Pensions under respondent's predecessors granted him a pension for the total and permanent disability of the left leg only and rated him therefor by certificate No. 55356, at $8 per month from date of discharge; $15 per month from June 6, 1866; $18 per month from June 4, 1872; $24 per month from November 23, 1881, and $30 per month from March 3, 1883, the rates specifically provided by law for the total and permanent disability alone of the leg, itstead of granting him a pension for his entire disabilities of the back and leg as aforesaid and at the aforesaid rates as provided by law therefor.

6. That he had often applied to have said error corrected and often demanded of the Commissioner of Pensions for the time being the reissuance of his said certificate, with ratings so corrected as to be conformable to law and commensurate with his entire disabilities aforesaid, but that the Pension Bureau under the predecessors of the respondent refused to comply with his demands and rejected his said applications.

7. That after repeated fruitless efforts to obtain at the hands of the Pension Bureau a proper and impartial administration of the pension laws in his behalf he finally appealed to the Secretary of the Interior to redress his grievances, and that the whole controversy between him and the Pension Bureau respecting the question of the rating of his pension came before the head of the Department for his official action and decision.

That the Secretary, upon a personal, careful inspection of the record and all the evidence filed therein in his case, and upon due consideration thereof, made and rendered the following official decision:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *February* 12, 1885.

The Commissioner of Pensions.

SIR: Herewith are returned the papers in the pension claim, certificate No. 55356, of Charles R. Miller.

It appears from the papers that Mr. Miller's claim was before this Department on the 6th instant, and it was held "the pensioner is greatly disabled, and it is evident from the papers in his case that he is utterly unable to do any manual labor and is therefore entitled to $30 per month under the act of March 3, 1883, which has been allowed him by your office."

Since the departmental decision above referred to the papers in the claim have been carefully reconsidered by the

Department and a personal examination of the pensioner made, and it satisfactorily appears that he is unable to put his shoe and stocking on the foot of the injured leg for the reason that the "nearest point that can be reached by hand from foot is 23 inches," and for the further reason that from "necrosis of the lower vertebræ of spine, producing anchylosis of the spinal column and destruction of some of the spinal nerves," he is unable to bend his back.

After a careful review of all the facts in this case the Department is contrained to think that the *pensioner comes under the meaning of the law granting pensions to those persons who require regular aid and attendance.*

The decision of the 6th instant is therefore overruled in so far as it denies that the pensioner requires regular aid and attendance.

Very respectfully, HENRY M. TELLER,
Secretary.

That this decision was made not only after a careful inspection of his person (for which purpose his clothing being entirely removed and the causes of his disability, as well of the back as of the leg injuries, being exposed to the sight of the eye), but upon a comparison of the same, as they then appeared to the natural sight, with the five original photographic views of his injuries of back and leg taken by the Army Medical Museum nearly twenty years prior thereto and at about the date of his discharge from the military service; that the language quoted by the Secretary descriptive of his disability and the back injury is taken from said photographic views and as written thereon at the time thereof, not for the purposes of procuring him a pension, but for compiling, so far as his case was concerned, an authentic surgical history of the war, and that this evidence was not before the Secretary at the time of the prior and overruled decision of February 6, 1885.

8. That the said official decision of the Secretary so made as aforesaid was a final adjudication of his claim in his favor and conclusively establishes his right under the law to be rerated at $25 per month from June 6, 1866; $31.25 per month from June 4, 1872; $50 per month from June 4, 1874, and $72 per month from June 17, 1878, and to be paid the difference monthly between these sums and what had been allowed him, and all that remained for the then Commissioner of Pensions to do in the premises was the simple ministerial duty of accordingly carrying the said decision into execution.

9. But that the then Commissioner of Pensions, instead of performing the whole of his ministerial duty thereunder by reissuing his certificate with the increased ratings aforesaid as provided by law for the disabilities he was so finally adjudged to have had from the time of the incurrence of his said wounds and injuries, reissued the same at $50 per month from January 14, 1885.

And that while this ministerial duty was thus but partially performed the respondent succeeded to the office of Commissioner of Pensions, and became thereby obligated and in duty bound to execute so much of the decision of the Secretary as his predecessor in office had refused, neglected, or omitted to execute.

10. That it was and now is the simple ministerial duty of the respondent, as Commissioner of Pensions, imposed by the said final judgment and decision of the Secretary, permitting and suffering the respondent to exercise no choice nor discretion in the premises, to reissue his said certificate at $25 per month from June 6, 1866; $31.25 per month from June 4, 1872; $50 per month from June 4, 1874, and $72 per month from June 17, 1878, as provided by law for those persons who, while in the military or naval service of the United States and in the line of duty, have become so

totally and permanently disabled as to require aid and attendance, and which said degree of disability he is finally adjudged to have by said decision; but that the respondent, as Commissioner of Pensions, has refused and still refuses to so reissue his certificate or discharge the plain duty imposed by the said official action and decision of the Secretary, although requested so to do.

And the relator prays for peremptory mandamus against the respondent to compel performance of this duty.

The cause was certified into this court by one of the justices to be heard in the first instance. On November 18, 1889, on motion by relator, a rule was laid on the respondent to show cause, if any he has, why the peremptory mandamus should not issue as in the petition prayed, returnable December 16, 1889. The time was enlarged to include the 20th day of December, on which day the respondent filed herein his return to said rule, and in his answer defends against peremptory mandamus on the following grounds:

1. That he is now and since October 19, 1889, has been the Commissioner of Pensions, and as such is and during all of said time has been charged by law with the performance, under the direction of the Secretary of the Interior, of such duties in connection with the various pension and bounty-land laws as may be prescribed by the President, and that in the practical administration of the affairs of the Pension Bureau he is and has been, if not by the express direction of the President, still with his full knowledge, consent, and approbation, the ultimate judge in all questions arising in said bureau under said laws, subject only to the right of appeal of any person deeming himself aggrieved by any decision he may make as such Commissioner to the Secretary of the Interior, and that, subject to such right of appeal, he is and during all of said time has been, in the manner aforesaid, invested with full discretion and *quasi*

judicial power in determining such questions; and that these have been the functions, duties, and powers of all his predecessors in said office since the establishment thereof.

2. That it appears from the records of the Pension Bureau the relator has been borne on the pension roll and paid for many years as a pensioner at the several rates and from the several dates set forth in the 5th and 9th paragraphs of the petition herein; that said rates and the dates from which they were respectively payable have been, according to said records, fixed by the several Commissioners from time to time in the exercise of their lawful discretion in the execution of the several pension laws applicable to relator's case.

3. That there is no law, and never has been, prescribing for a disability of the character of that of the relator a specific rate of pension, and that, in determining the rates of pension to which the relator was from time to time entitled, the several Commissioners, his predecessors, have had to determine and, in the exercise of their lawful discretion, have determined to what specific disability—the rate of pension for which was fixed by law—the unspecified disability of the relator was equivalent, and in the exercise of such lawful discretion they have fixed his rates of pension according to this standard of comparison.

4. That protesting, nevertheless, in showing cause he is under no duty to set forth the grounds and reasons upon which his administration of the pension laws has proceeded, it is not true, as stated in relator's petition, he has failed or refused to carry out the decision of the Secretary of the Interior made on relator's appeal, in February, 1885, from the decision of the then Commissioner, and says that on the 6th day of February, 1885, the then Secretary, Henry M. Teller, decided the action of the Pension Bureau was correct in granting the relator a pension of $8 per month from

August 27, 1865, the date of discharge; $15 per month from June 6, 1866; $18 per month from June 4, 1872, and $24 per month from March 3, 1883, with the exception that the pension was improperly reduced June 4, 1882, from $24 to $18 per month, and that from the last-mentioned date to March 3, 1883, the relator should be paid the difference between $24 and $18 per month, and says that the said Secretary in his said decision says that he "*is constrained to think that he* (the relator) *does not require regular aid and attendance within the meaning of the law.*"

And he further says that true it is that afterwards, to wit, on the 12th day of February, 1885, and upon *additional* evidence, the said Secretary did revise and review his said decision and partially reverse and annul the same, holding, in these words, that "*after a careful review of all the facts in this case the Department is constrained to think that the pensioner comes under the meaning of the law granting pensions to those persons who require regular aid and attendance. The decision of the 6th instant is therefore overruled in so far as it denies that the pensioner requires regular aid and attendance;*" which said decision, he maintains, was a reaffirmance of the said decision of the 6th of February, 1885 (this last-mentioned date being the date of the physical examination of the relator by the medical officers of the Pension Bureau next preceding the date of said decision of said Secretary), in all other respects and particulars, and must be understood to refer exclusively to the condition of the relator about the time the decision was made, and that the same was so interpreted by the Pension Bureau, which accordingly issued a new certificate at $24 per month from June 4, 1882, and an increase of $30 per month from March 3, 1883, and $50 per month from January 14, 1885, which said action was afterwards affirmed on relator's appeal by Assistant Secretary Hawkins.

5. He denies that the effect of the decision of the Secretary of February 12, 1885, was to entitle the relator to the

several rates of pension set forth in the 8th paragraph of the petition, but avers that the effect thereof was to entitle the relator to the several rates set forth in the 4th paragraph of his answer, and that he and his predecessor, John C. Black, have in all respects conformed thereto.

6. That the provision of the law under which the relator claims to be entitled to be carried on the pension roll at the rate of $72 per month from June 17, 1878, is contained in the act of June 16, 1880 (21 Statutes at Large, p. 281), the operation of which is limited to "all soldiers and sailors who are now (*i. e.*, at the date of the act) receiving a pension of $50 per month under the provisions of an act" therein cited, whereas the relator, according to his own showing and in fact, was at that time only receiving a pension of $18 per month, which said rate had been theretofore fixed by the Commissioner of Pensions for the time being in the exercise of his lawful discretion.

7. That he is advised that it is beyond the province of the court to revise or review the interpretation placed by him on said act of June 16, 1880, and conceives it would be destructive of uniformity and productive of disorder for the judicial department of the Government to interfere in the administration of the complicated system of laws establishing and regulating pensions; and the respondent prays to be discharged with his costs.

On December 23, 1889, the relator filed his motion in writing for the peremptory mandamus, notwithstanding the return of the respondent above set out to the rule to show cause.

And now the cause comes on for a hearing on said motion.

Argument in Behalf of the Relator on said Motion.

The order of the argument herein will vary somewhat from that in the same case against respondent's predecessor in office. This change results from the difference between the return of the respondent herein and that of his predecessor. Barring certain immaterial errors which, no doubt, were inadvertently made, the answer of the respondent contains no averments designed to mislead the court as to the facts of the case. The return, taken as a whole, may be summarized into a simple denial that the decision in question of Secretary Teller is of the import to grant unto the relator the rates of pension as by him claimed, namely, $25 per month from June 6, 1866; $31.25 per month from June 4, 1872; $50 per month from June 4, 1874, and $72 per per month from June 17, 1878.

Merely now adverting to the fact that the decision of this question by the Supreme Court of the United States in this very case against Commissioner Black is against the respondent in his contention and in favor of the relator, I first propose to consider the said decision of the Secretary in the light of the law as enacted by Congress and under the provisions of which the relator's case was finally adjudged came.

I.

Secretary Teller, on February 12, 1885, made the decision set forth in the 7th paragraph of relator's petition and upon the additional evidence as therein alleged. The averments of the petition in this behalf are nowhere denied by the respondent in his return. They are therefore to be taken as true.

The Secretary of the Interior, referring to the relator, decided that "THE PENSIONER COMES UNDER THE MEANING OF

THE LAW GRANTING PENSIONS TO THOSE PERSONS WHO REQUIRE REGULAR AID AND ATTENDANCE."

And such decision was made upon a claim for pension filed years prior to July 1, 1880, the date of limitation to arrears of pensions as fixed by the act of March 3, 1879, *infra*. Miller is therefore within the terms of that act. He was discharged August 27, 1865, and having incurred his disabilities in the service he is entitled to a pension from the date of discharge and at such rates as are specifically provided by the law of Congress from time to time from thence until now for "*those persons who require regular aid and attendance.*"

It will be observed that the relator does not claim in his petition a higher rate of pension than has been granted him until June 6, 1866, which is the date of the first act of Congress designating the rate of pension for the specified disability "requiring the regular aid and attendance of another person." Prior to that act an enlisted soldier could receive in no case a higher rate than $8 per month, no matter how great was the degree of his helplessness, and this rate was provided by the act of July 14, 1862, § 4695, R. S.; but from June 6, 1866, the degree of disability the relator stands adjudged, by the final judgment of Secretary Teller, to have incurred in the service and line of duty has been specified in the law of Congress as entitling a pensioner to a fixed, specified rate of pension from time to time, the amount and the date of the commencement thereof being fixed by Congress in the law itself.

The several acts, or so much thereof as constitute the law, under the meaning of which the relator stands finally adjudged to come are as follows:

Act of March 3, 1873, *to Revise, Consolidate, and Amend the Pension Laws.* (17 *Statutes at Large, chapter* 234, *pp.* 568, 569.)

SEC. 3. * * * And for the period commencing June sixth, eighteen hundred and sixty-six, and ending June

third, eighteen hundred and seventy-two, those persons entitled to a less pension than hereinafter mentioned who, by *reason of injury received or disease contracted* in the military or naval service of the United States and in the line of duty, shall have been *permanently* and *totally* disabled in both hands, or who shall have lost the sight of one eye, the other having been previously lost, *or who shall have been otherwise so totally and permanently disabled as to render them utterly helpless, or so nearly so as to require regular personal aid and attendance of another person, shall be entitled to a pension of twenty-five dollars per month.* (§ 4697, R. S.)

SEC. 4. That from and after June fourth, eighteen hundred and seventy-two, all persons entitled by law to a less pension than hereinafter specified who, while in the military or naval service of the United States and in line of duty, shall have lost the sight of both eyes, or shall have lost the sight of one eye, the sight of the other having been previously lost, or shall have lost both hands, or shall have lost both feet, or been permanently and totally disabled in the same, *or otherwise so permanently and totally disabled as to render them utterly helpless, or so nearly so as to require the regular personal aid and attendance of another person, shall be entitled to a pension of thirty-one dollars and twenty-five cents per month.* (§ 4698, R. S.)

Act June 18, 1874, *to Increase the Pension of Soldiers and Sailors who have been Totally Disabled.* (18 *Statutes at Large, chapter* 298, *p.* 78.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section four of the act entitled "An act to revise, consolidate, and amend the laws relating to pensions," and approved March third, eighteen hundred and seventy-three, be so amended that all persons who, while in the military or naval service of the United States and in the line of duty, shall have been so permanently and totally disabled as to require the regular personal aid and attendance of another person by the loss of the sight of both eyes or by the loss of the sight of one eye, the sight of the other having been previously lost, or by the loss of both hands, or by the loss of both feet, or by any other injury resulting in total and permanent helplessness, shall be entitled to a pension of fifty

dollars per month; and this shall be in lieu of a pension of thirty-one dollars and twenty-five cents per month granted to such person by said section: *Provided*, That the increase of pension shall not be granted by reason of any of the injuries herein specified unless the same shall have resulted in permanent, total helplessness, requiring the regular personal aid and attendance of another person.

SEC. 2. That this act shall take effect from and after the fourth day of June, eighteen hundred and seventy-four.

Approved June 18, 1874.

Act March 3, 1879, *Making Appropriations for the Payment of Arrears of Pensions and Amending the Arrears of Pension Act of January* 25, 1879. (20 *Statutes at Large, chapter* 187, *p.* 470.)

* * * * * * *

That the rate at which the arrears of invalid pensions shall be allowed and computed in the cases which have been or shall hereafter be allowed shall be graded according to the degree of the pensioner's disability from time to time and the provisions of the pension laws in force over the period for which the arrears shall be computed.

That section one of the act of January twenty-fifth, eighteen hundred and seventy-nine, granting arrears of pensions, shall be construed to extend to and include pensions on account of soldiers who were enlisted or drafted for the service in the war of the rebellion, but died or incurred disability from a cause originating after the cessation of hostilities and before being mustered out: *Provided*, That in no case shall arrears of pensions be allowed and paid from a time prior to the date of actual disability.

SEC. 2. All pensions which have been or which may hereafter be granted in consequence of death occurring from a cause which originated in the service since the fourth day of March, eighteen hundred and sixty-one, or in consequence of wounds or injuries received or disease contracted since that date, shall commence from the death or discharge of the person on whose account the claim has been or is hereafter granted, if the disability occurred prior to discharge; and if such disability occurred after the discharge, then from the date of actual disability or from the termination of the right of the party having prior title to such pension: *Pro-*

vided, The application for such pension has been or is hereafter filed with the Commissioner of Pensions prior to the first day of July, eighteen hundred and eighty, otherwise the pension shall commence from the date of filing the application; but the limitation herein prescribed shall not apply to claims by or in behalf of insane persons and children under sixteen years of age.

SEC. 3. Section forty-seven hundred and nine of the Revised Statutes is hereby repealed.

Act June 16, 1880, *to Increase the Pensions of Certain Pensioned Soldiers and Sailors who are Utterly Helpless from Injuries Received or Disease Contracted while in the United States Service.* (21 *Statutes at Large, chapter* 236, *p.* 281.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all soldiers and sailors who are now receiving a pension of fifty dollars per month, under the provisions of an act entitled "An act to increase the pension of soldiers and sailors who have been totally disabled," approved June eighteenth, eighteen hundred and seventy-four, shall receive, in lieu of all pensions now paid them by the Government of the United States, and there shall be paid them in the same manner as pensions are now paid to such persons the sum of seventy-two dollars per month.

SEC. 2. All pensioners whose pensions shall be increased by the provisions of this act from fifty dollars per month to seventy-two dollars per month shall be paid the difference between said sums monthly from June seventeenth, eighteen hundred and seventy-eight, to the time of the taking effect of this act.

Approved June 16, 1880.

And thus is the law written by Congress in language so plain that "he who runs may read and understand," providing a pension of $25 per month from June 6, 1866; $31.25 from June 4, 1872; $50 from June 4, 1874, and $72 per month from June 17, 1878, to all persons who, while in the military or naval service and in line of duty, have been so permanently and totally disabled as to render them utterly

helpless, or so nearly so as to require the regular aid and attendance of another person, and who shall have filed their claims prior to July 1, 1880. It is this degree of disability that calls for these rates successively under the law, and it makes no difference from what cause the same arises, whether from total blindness, the loss of both hands, the loss of both feet, or from any other wounds or injuries, or from disease. It is the *disability itself* that calls for the pension, and *not* the cause or causes thereof. It is under the meaning thereof that Secretary Teller decided that the case of the relator comes.

And now let us consider for a moment what facts entered into this judgment of the Secretary, wherein he decided that Miller's case comes under the meaning of this law of Congress.

What cases come under the meaning of the law? What is the character and nature of the disability that brings a case under the law? If a given case does *not* come "under the meaning of the law granting pensions to those persons who require regular attendance," where does it come; where must it come?

The Secretary, in plain language, decided that the relator "*comes under the meaning of the law granting pensions to those persons who require regular aid and attendance;*" his judgment therefore establishes the *existence* in Miller's case of *every fact* and *condition* that *are absolutely essential* to bring a pension case thereunder; and what are these *essentials* of the law? They are, first, that the disability must be PERMANENT in character; second, it must exist in such *permanent* degree as to render the pensioner utterly helpless or so nearly so as to require the *regular aid and attendance* of another person; and, third, the pensioner must have filed his claim prior to July 1, 1880. All these *conditions* must concur in a case to bring it "*under the law granting* pensions *to those persons who require regular aid and attendance.*" *They therefore necessarily entered into the judgment of Secretary Teller* and became *res judicata*

thereby. That judgment conclusively established in Miller's behalf (1) that his disability is PERMANENT as contradistinguished from a disability that is *progressive*; (2) that his disability has existed in such *permanent* degree as to render him so *utterly helpless* as to *require* the *regular aid* and *attendance of another person*, and (3) that he filed his claim prior to July 1, 1880.

Any *defense* that may be set up against *mandamus* in this case, that Miller's disability has *not* been *permanent* nor *permanently* existed in such *degree* as to *reduce* him to a *condition* of *such* helplessness as to *require* the *regular aid* and *attendance* of another person, or that he did not file his claim prior to July 1, 1880, is in REVERSAL of the final judgment in the case of Secretary Teller, and which, with respect thereto, the Supreme Court has declared put an end to the exercise of all judgment and discretion.

II.

But, notwithstanding the said final and conclusive judgment of the Secretary, the respondent's predecessor successfully maintained in this court the defense that Miller's case comes under section 4698½ Revised Statutes, and not "*under the meaning of the law granting pensions to those persons who require regular aid and attendance*," as found by the Secretary.

Section 4698½ is as follows:

SEC. 4698½. Except in cases of permanent specific disabilities no increase of pension shall be allowed to commence prior to the date of the examining surgeon's certificate establishing the same made under the pending claim for increase, and in this, as well as all other cases, the certificate of an examining surgeon or of a board of examining surgeons shall be subject to the approval of the Commissioner of Pensions.

It is manifest that Miller cannot "*come under the meaning of the law granting pensions to those persons who require regular*

aid and attendance," and at the same time come under this section of the Revised Statutes, unless he possesses the element of ubiquity.

The Secretary makes a decision; the Commissioner makes a contrary decision; the Court sustains the Commissioner, and in this *reverses* the judgment of the Secretary and *overrules* the Supreme Court of the United States on this very question and in the same case, nor can the judgment of this court, pronounced February 18, 1889, in this case against Black, denying the peremptory mandamus and dismissing the relator's petition therein, be relieved by any argument from the truth and justice of this criticism. Not a question can arise in this case on the respondent's return and not a question did or could arise on Black's return that was not presented to and decided by the Supreme Court of the United States, as I will hereinafter show.

III.

Neither did Black nor does the respondent defend against peremptory mandamus on the ground (1) that there is no such case on the pension roll as described in the petition, nor that the relator is a fiction—a John Doe or Richard Wroe; (2) that Secretary Teller did not make the decision on which the application for the writ is predicated, nor that the said decision was procured by the bribery of the Secretary or other fraud, nor (3) that the said decision has been carried out as by the relator claimed, nor does the respondent nor did his predecessor, Black, make any other defense that cuts at right angles and bars the way to the peremptory writ under the decision of the Supreme Court of the United States, but, on the contrary, the respondent in his answer defends—

IN THE FIRST PARAGRAPH, That he is the ultimate judge of all questions arising in the discharge of the functions of his office, and that an appeal lies only to the Secretary from his

official decisions, in the rendering of which he exercises quasi-judicial power, and, so far as he goes, he is in exact harmony with the contention of the relator; but the answer is silent on the question of the nature of his duty in a case in which the Secretary in the exercise of his appellate authority has reversed his judgment. In such case the relator contends that it is his ministerial duty to carry such judgment into execution according to law, and in this contention he is fully sustained by the opinion and decision of the Supreme Court of the United States.

IN THE SECOND PARAGRAPH, That the relator has been borne on the pension roll for many years and paid such rates of pension as the several Commissioners from time to time have fixed in the exercise of their lawful discretion.

The averment herein that the Commissioners have in their discretion fixed the rates that have been allowed the relator from time to time is in the face of the law of Congress specifically fixing such rates. But suppose it was true, as alleged, and was not contradicted by the plain letter of the law, then there is no defense found therein to mandamus to compel obedience to the decision of the Secretary.

IN THE THIRD PARAGRAPH, "That there is no law and never has been prescribing for a disability of the character of that of the relator a specific pension, and that in determining the rates of pension to which the relator was from time to time entitled the several Commissioners of Pensions, predecessors of the respondent, have had to determine, and in the exercise of their lawful discretion have determined, to what specific disability the rate of pension was fixed by law, the unspecified disability of the relator was equivalent, and in the exercise of such lawful discretion they have fixed his rates of pension according to this standard of comparison."

These are the exact words used by the respondent. And does the court see any defense therein to peremptory mandamus?

The *character* of the relator's disability is not open to the judgment nor the scrutiny of the court. That question is foreclosed by the judgment of Secretary Teller, which cannot be reviewed in a court of law. By that judgment the *character* of the relator's disability is decided to be such as to bring Miller "*under the meaning of the law granting pensions to those persons who require regular aid and attendance,*" nor can the respondent assign a different *character* to his disability without overruling his official superior, whose judgment in the premises is declared by the Supreme Court to have *put an end to the exercise of all further judgment and discretion.*

The sole inquiry is, Has the decision of the Secretary been carried out? and not whether the respondent or the court itself, if authorized so to do, would have rendered a different decision, nor what have been or now are the lawful discretionary duties of the Commissioner of Pensions. It is enough to know that by the judgment of the Supreme Court the Commissioner has no discretionary duties to perform with respect to the carrying out of this decision of the Secretary. That Court has said that he is bound to carry it out without further question.

But when the respondent says that "*there is no law and never has been prescribing a specific rate of pension for the disability*" of the relator, does he refer to the laws as enacted by Congress or to the conflicting laws he found in vogue, when he assumed office, enacted by the Bureau of Pensions under his predecessors? If he refers to the laws of Congress, is he aware that in this averment he is overruled by the Supreme Court in this very case? That was *the* question before the Court, whether Miller stood adjudged by the Secretary's decision to have that *specific* disability that entitled him to the ratings specified in the law. The answer of the Court was in the affirmative. This was the main question involved, and that was settled in the affirmative by the judgment of that Court reversing this court.

The laws of Congress grant no pension at all for a wound,

injury, nor for disease. These are but causes of disability, and the *cause* is *not* the thing pensionable, but the *resulting disability*. *Disability alone* and *only* entitles a claimant to pension under the laws of Congress; and every case of disability for which a specific rate of pension is provided by law is plainly declared in section 4692, Revised Statutes, to be a "*specific disability*."

The scheme of the pension laws, as enacted by Congress, is to grant *equal pensions for equal disability, no matter from what cause or causes arising* in the service and in line of duty; and in furtherance of this scheme the laws—I mean of Congress—divide all pensioners into two general classes called the *specific* and *non-specific* classes. The *specific* class of pensioners is again divided into three sub-classes called the *first* class, *second* class, and *third* class. The first class includes all those persons who, from any cause or causes whatsoever arising in the service and line of duty, have been so permanently and totally disabled as to render them utterly helpless or so nearly so as to require the regular personal aid and attendance of another person; and every person so disabled in the late war and stands adjudged to be thus disabled, upon an application filed at any time prior to July 1, 1880, is entitled to the rates of pension herein claimed for the relator.

To this class Miller was adjudged by the Secretary to belong.

The second class includes all those persons who, from any cause or causes whatsoever arising in the service and in the line of duty, have been so disabled as to be incapacitated for performing any manual labor, but not so much so as to require the regular personal aid and attendance of another person; and any person who stands finally adjudged to have incurred this specific disability in the service and line of duty is entitled to the rates of pension specified therefor in the law.

The third class includes all those persons who, from any

cause or causes whatsoever arising in the service and lin of duty, have been so disabled as to render their incapacity to perform manual labor equivalent to the loss of a hand or foot; and every person who has been finally adjudged to have incurred this specific disability in the service and line of duty is entitled to the rates of pension specifically provided therefor.

And so read the laws of Congress, couched in such plain and simple language as to interpret their own meaning. (§§ 4697, 4698, R. S.)

The Commissioner of Pensions, unless he is a law unto himself, has not a word to say in fixing the rate of pension in any case adjudged as coming within either of these classes. His judgment and discretion end when he shall have fixed the degree of disability.

The Secretary has fixed the degree of the relator's disability, and the Supreme Court has decided that that ended all discretion, and that it is the ministerial duty of the Commissioner to carry the decision out.

It is otherwise in the non-specific class, to which belong the majority of pensioners. This class includes all persons who, from any cause or causes whatsoever arising in the service and line of duty, have been disabled to an extent less than results from the loss of a hand or a foot. As to these, the Commissioner of Pensions is authorized and required by law to fix the rate of pension, being restricted in fixing the amount of the same to within $18 per month. (§ 4699, R. S.)

But all of this has not the remotest bearing on the question—the only question before the court—whether Secretary Teller's decision has been carried out. If it has not been, then mandamus is the appropriate remedy to be invoked to that end, and so the Supreme Court has decided.

In fourth paragraph, "Further answering, says (protesting at the same time that in showing cause under the said rule he is under no duty to set forth the grounds and

injury, nor for disease. These are but causes of disability, and the *cause* is *not* the thing pensionable, but the *resulting disability*. *Disability alone* and *only* entitles a claimant to pension under the laws of Congress; and every case of disability for which a specific rate of pension is provided by law is plainly declared in section 4692, Revised Statutes, to be a "*specific disability.*"

The scheme of the pension laws, as enacted by Congress, is to grant *equal pensions for equal disability, no matter from what cause or causes arising* in the service and in line of duty; and in furtherance of this scheme the laws—I mean of Congress—divide all pensioners into two general classes called the *specific* and *non-specific* classes. The *specific* class of pensioners is again divided into three sub-classes called the *first* class, *second* class, and *third* class. The first class includes all those persons who, from any cause or causes whatsoever arising in the service and line of duty, have been so permanently and totally disabled as to render them utterly helpless or so nearly so as to require the regular personal aid and attendance of another person; and every person so disabled in the late war and stands adjudged to be thus disabled, upon an application filed at any time prior to July 1, 1880, is entitled to the rates of pension herein claimed for the relator.

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The second class includes all those persons who, from any cause or causes whatsoever arising in the service and in the line of duty, have been so disabled as to be incapacitated for performing any manual labor, but not so much so as to require the regular personal aid and attendance of another person; and any person who stands finally adjudged to have incurred this specific disability in the service and line of duty is entitled to the rates of pension specified therefor in the law.

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The Secretary has fixed the degree of the relator's disability, and the Supreme Court has decided that that ended all discretion, and that it is the ministerial duty of the Commissioner to carry the decision out.

It is otherwise in the non-specific class, to which belong the majority of pensioners. This class includes all persons who, from any cause or causes whatsoever arising in the service and line of duty, have been disabled to an extent less than results from the loss of a hand or a foot. As to these, the Commissioner of Pensions is authorized and required by law to fix the rate of pension, being restricted in fixing the amount of the same to within $18 per month. (§ 4699, R. S.)

But all of this has not the remotest bearing on the question—the only question before the court—whether Secretary Teller's decision has been carried out. If it has not been, then mandamus is the appropriate remedy to be invoked to that end, and so the Supreme Court has decided.

IN FOURTH PARAGRAPH, "Further answering, says (protesting at the same time that in showing cause under the said rule he is under no duty to set forth the grounds and

reasons upon which his administration of the pension laws or any of them has proceeded) that it is not true, as stated in relator's petition, that respondent has failed and refused to carry out the decision of the Secretary of the Interior made on relator's appeal in the month of February, 1885, from the decision of the then Commissioner of Pensions; and the respondent says that on the 6th day of February, 1885, the then Secretary, the Honorable Henry M. Teller, decided that the action of the Pension Bureau was correct in granting the relator a pension of $8 per month from August 27, 1865, the date of his discharge; of $15 per month from June 6, 1866; of $18 per month from June 4, 1872, and $24 per month from March 3, 1883, with the exception that his pension was improperly reduced on June 4, 1882, from $24 to $18 per month, and that from the last-mentioned date to March 3, 1883, the relator should be paid the difference between $24 and $18 per month;" and respondent says that the said Secretary, in his said decision, says that he "*is constrained to believe that he* (*the relator*) *does not require regular aid and attendance within the meaning of the law.*"

"And the respondent further says that true it is that afterwards, to wit, on the 12th day of February, 1885, and upon *additional* evidence the said Secretary did revise and review his said decision, and did partially reverse and annul the same, holding, in these words, that '*after a careful review of all the facts in this case the Department is constrained to think that the pensioner comes under the meaning of the law granting pensions to those persons who require regular aid and attendance. The decision of the 6th instant is therefore overruled in so far as it denies that the pensioner requires regular aid and attendance;*' which said decision, this respondent respectfully maintains, was a reaffirmance of the said decision of the 6th of February (this said last-mentioned date being the date of the physical examination of the relator by the medical officers of the Pension Bureau next preceding the date of said decision of said Secretary of the Interior) in all other respects and particulars and must be understood to refer exclusively

to the condition of the relator about the time the decision was made; and this respondent says that said decision was so interpreted by the Pension Bureau, which did accordingly issue a new certificate to the relator at $24 per month from 4th June, 1882, and at an increase of $30 per month from 3d March, 1883, and at $50 per month from 14th January, 1885; which said action of the Pension Bureau was afterwards affirmed, on the relator's appeal, by Assistant Secretary of the Interior Hawkins."

I will take up and notice the averments in this paragraph of the respondent's answer *seriatim*, but in passing will observe that there is no necessity for the respondent to protest that he is under no obligation to set out the grounds or reasons upon which his administration of the pension laws has proceeded, since this court has no appellate jurisdiction over the respondent in the discharge of his administrative functions and is not judicially concerned about the "grounds" or "reasons" upon which he proceeds in the discharge of such functions, but I will add that if the respondent in the administration of the pension system is proceeding at all on any well-defined "grounds," or is governed at all in the discharge of the functions of his office by "reasons," then his administration of the pension laws is in marked contrast with that of either of his predecessors for the past twenty-five years, and we may joyfully hope not to see under his regime any such incongruities as one person pensioned at $72 per month for "nearly total blindness;" another at $6 for "total blindness of one eye and nearly total blindness of the other;" as one person pensioned at $8 per month for the "loss of *one* finger;" another at $2 for the loss of *three* fingers," including that *one*, and at the same place, which incongruities pile up like Pelion on Ossa in the pension roll as published in January, 1883, clearly demonstrating that the administration of the pension laws theretofore had proceeded upon no "grounds" nor "reasons" whatever, but that the nation's bounty was given out without any regard for fixed laws or rules of justice and equality.

And, in passing, I will further observe that there is no proposition in this case looking to the interference by this court in any manner, shape, or form with the executive functions of the respondent, or with the exercise of his official discretion and judgment, or with the *quasi* judicial powers with which he is clothed by law as the Commissioner of Pensions; on the contrary, this is an original suit brought in this court of original jurisdiction for the writ of mandamus to compel the respondent to perform a simple ministerial act, which he is bound to perform without further question, not in his character of Commissioner of Pensions, but as *the* officer of the law by virtue of the office he holds; and so the Supreme Court has decided in this very case against respondent's predecessor.

The first averment in this paragraph of the answer is that it is not true, as alleged in the petition, that the respondent has failed and refused to carry out the decision of the Secretary in question.

This averment is a conclusion of law, and, unfortunately for the respondent, the Supreme Court of the United States has disagreed with him. That Court was of the opinion that respondent's predecessor had failed and refused to carry out said decision, and the case stands now just as it did then.

The second averment is that on the 6th February, 1885, Secretary Teller made a certain other decision in the relator's case, but the decision is not set out in the answer, and all the court can know about it is what the respondent says; and it hardly pertains to the *executive functions* of the Commissioner of Pensions to *interpret* the *meaning* for a court of law of an *official decision* of the Secretary.

As a general rule, courts prefer to put their own interpretation upon written instruments; but if the court had any authority of law (which it has not) to accept the construction put by the respondent upon the said alleged decision of the 6th February, 1885, as the correct interpretation of the meaning thereof, I do not know that I would object to what

the respondent has said the Secretary then decided, namely, that he (the Secretary) "*is constrained to think that he* (the relator) *does not require regular aid and attendance within the meaning of the law.*"

Now, suppose the Secretary did decide on the 6th February, as alleged, what of it? The relator is not trying to enforce that decision by mandamus, but a later decision made upon *additional* evidence. The earlier decision cannot overrule the later, unless the natural order of things be reversed. I had always supposed the later decision overruled all prior decisions in conflict therewith. This is the way the thing is put in the overruled cases that *are* published for the benefit of the legal profession.

There is hardly a point in this averment.

The third averment is that Secretary Teller afterwards, and upon *additional* evidence, on 12th February, 1885, revised and reviewed his alleged decision of the 6th of that month, and partially overruled the same, holding, in these words, that "*after a careful review of all the facts in the case the Department is constrained to think that the pensioner comes under the meaning of the law granting pensions to those persons who require regular aid and attendance.* The decision of the 6th instant is therefore overruled in so far as it denies that the pensioner requires regular aid and attendance;" and the respondent maintains that the later decision was a reaffirmance of the decision of the 6th February in all other respects and particulars.

Well, suppose it was, what of it? Would that relieve the respondent of the ministerial duty of carrying out the decision of the 12th February? Whether this decision overrules or affirms a prior departmental decision, the duty of carrying the same out exists all the same, and this has been declared to be a ministerial duty which the Commissioner is bound to perform without further question, by the Supreme Court of the United States, in this very case against Black.

But whether the later decision partially overrules and

partially affirms the prior decision of February 6, 1885, can be determined only by the court upon an inspection and comparison of the two decisions, and, since the decision of the 6th February is not before the court, this question cannot lawfully be considered.

It would, however, be difficult to see how the later decision, holding that Miller "*comes under the meaning of the law granting pensions to those persons who require regular aid and attendance*," can in any respect reaffirm an earlier decision of the Secretary, holding, as the respondent says, that the relator "*does not require regular aid and attendance within the meaning of the law.*" There is no point in this.

What we are after is the carrying out of this last decision which declares that "the pensioner comes under the meaning of the law, granting pensions to those persons who require regular aid and attendance," and which is declared by the Supreme Court to have put an end to all further judgment.

The fourth averment is that the said decision of the 12th February was so interpreted by the Pension Bureau and that its action in that behalf was affirmed on appeal of relator by Assistant Secretary Hawkins.

Well, suppose that was all so, would this relieve the respondent of the ministerial duty of carrying the said decision out according to the judgment of the Supreme Court?

But the return fails to set out Miller's appeal or the alleged overruling decision of Assistant Secretary Hawkins. What is the court going to do about it? Are the construction and interpretation placed thereon by the respondent to be taken in lieu thereof? Does the court propose to relinquish a part of its judicial functions in this case to the Commissioner of Pensions? Does the respondent claim that it is within the scope and purview of his executive functions or his *quasi* judicial powers to come in, and, without exhibiting the relator's appeal or the alleged adverse decision by Hawkins thereon, inform the court what was the char-

acter of such appeal, what it contained, what relief was prayed for, and what Assistant Secretary Hawkins decided or did not decide; and does he contend that his interpretation put thereon concludes the relator and the court with respect to such appeal and alleged decision? I prefer the court to put its own interpretation on these written instruments, and since they are not in the case the court cannot do this. I therefore object to any consideration at all of this averment of this paragraph of the answer.

But now that the respondent has given his version of the relator's alleged appeal and the decision of Assistant Secretary Hawkins thereon, suppose the relator indulges his hand in the same direction. His version is that the decision of Secretary Teller of the 12th February, 1885, having miscarried through the villainous frauds of the Pension Bureau (not under Black, but under his predecessor, at the head and front of which the author and progenitor thereof was the then First Deputy Commissioner, whose personal adverse action and decision were thereby reversed), he appealed back to the same Secretary to compel the carrying out of his said decision, according to the plain letter thereof; but this was on the eve of his surrendering office to his successor; and before the appeal came on to be considered Congress had created the office of Second Assistant Secretary of the Interior, and had assigned to the incumbent thereof supervision of pension appeal cases, to which office Daniel L. Hawkins had been appointed; and thus his appeal, which was addressed to Secretary Teller, came before Assistant Secretary Hawkins; but Hawkins did not decide that if Secretary Teller's decision were carried out the relator would not get the accrued or arrears of pension as claimed.

That proposition was too plain to be controverted even by Hawkins, whose ignorance was proverbial in the last administration. On the contrary, he decided that "*after a careful consideration of all the papers in this case the Depart-*

ment is of the opinion that there is nothing in the evidence to show that Mr. Miller has been entitled to a higher rate of pension than that allowed by your office."

Such decision was not at all responsive to the appeal, but was, in effect, a reversal of the prior decision of Secretary Teller — a decision which the Supreme Court of the United States had declared to have put an end to the exercise of all further discretion and judgment, and which the Commissioner was bound to carry out without further question.

I take the occasion here to say that every question that was raised by the return of Black to the alternative writ and every question raised now by the answer of the respondent arose on the face of relator's petition and the law applicable to the facts therein alleged before the Supreme Court of the United States at the hearing thereof, and were severally by that Court overruled and declared to constitute no valid reason against peremptory mandamus, save and except the question of the effect of this alleged subsequent decision by Hawkins.

This question did not arise on relator's petition nor under the law applicable to the state of facts therein set out. But it was before that Court, all the same, and this defense was there considered and overruled. It was made in the written brief of the Department of Justice and was orally argued before the Court.

At page 3 of his brief in this case against Black before that Court the Honorable Wm. A. Maury, Assistant Attorney General, defending against mandamus, said:

"If the Commissioner has failed or refused to carry out the decision of the Secretary the relator should apply to the Secretary to compel him to do so. This he has not done. His application for a mandamus was therefore improvident and properly dismissed."

In reply to this contention on behalf of Black in my brief, at page 6, I said, and here repeat:

"But it will strike the Court as a novel proposition of law that the Secretary of the Department of the Interior has appellate jurisdiction over any official whatsoever in the matter of the performance or non-performance of a mere ministerial act such as the law in precise term commands to be performed in behalf of the person interested in the performance thereof. It is difficult to conceive of an appellate jurisdiction taking cognizance of a matter over which and concerning which not the slightest judgment or discretion could be exercised. The right to hear an appeal carries with it usually the right to determine whether the inferior from whose act or refusal to act the appeal is taken is right or wrong; but pray tell where does the Secretary get his authority to say that the refusal of the Commissioner of Pensions to obey the mandate of the law is right? Could he affirm such refusal, and would the Commissioner be under any less obligation to obey the law if he should? But suppose the Secretary should order the Commissioner to obey the law and execute its mandate, would that make it any more obligatory upon the Commissioner to do what the law already enjoins upon him?

"The position of the relator is that the law is above both the Secretary and the Commissioner; that the former cannot justify nor excuse its violation by the latter nor by any act of his add one jot or tittle to the obligatory character of its commands. *Lex suprema est.* An appeal, therefore, in the case of a refusal of an inferior executive officer to perform a mere ministerial act would be a judicial farce, since it could not possibly result in any change whatever in the conditions of the parties under the law."

The contention of the respondent was overruled, that of the relator sustained by that Court.

And so it is that this only remaining question that was raised by Black in his return and now raised by the respondent in his answer to the rule was before the Supreme Court of the United States and decided in favor of the relator.

Any judicial mind that can conceive of the legal proposi-

tion that any executive officer of the Federal Government can be relieved from the performance of a mere ministerial duty by the exercise of any lawful authority on earth is in a sort of *juridical mania potu*, seeing strange, monstrous, ghastly, hideous forms in the law.

No act that is to be performed by an executive officer is reduced to a mere ministerial duty until all discretion and judgment have been exhausted in and about the same. If the appellate authority can in any way relieve the inferior from the performance of the act, then the performance thereof is not a ministerial duty, but one involving the exercise of judgment and discretion, a *quasi* judicial duty, to compel the performance of which a mandamus will not lie. Is this plain?

If Secretary Teller had remained in office and Miller's complaint had been called to his attention he would probably have sent for the Commissioner of Pensions for a private interview to briefly discuss the question, which is the official superior, the head of the Department or the head of the Pension Bureau? Hawkins had no jurisdiction whatever to pronounce the judgment he did therein. He was never known, however, to refuse anything, except the claims of pension appellants before the Department. He would take jurisdiction of any case that was brought before him, even though it involved the title to all the fish of the sea.

The inchoate right and title of Miller to the rates of pension as by him claimed were reduced into an absolute, vested right and title thereto by the decision of the Secretary of the 12th February in question.

The highest appellate authority had decided the matter in controversy in his favor and that decision was final, and so the Supreme Court has decided.

IN PARAGRAPH 5, Respondent denies that the effect of the decision of the Secretary of the 12th February, 1885, referred to in paragraph 7 of the petition, was to entitle the relator to the several rates of pension set forth in the 8th

paragraph of the petition, but avers, on the contrary, that the effect of said decision was to entitle the relator to the several rates of pension in the 4th paragraph of respondent's answer set forth, and both the respondent and his predecessor have in all respects conformed thereto.

The matter of defense alleged in this paragraph of the answer is set up in paragraph 4 by the respondent. The only difference is found in the different forms of the averment. The fatal objection to the matter thus alleged as a legal defense is that it overrules the judgment and decision of the Supreme Court of the United States, as hereinbefore pointed out.

IN PARAGRAPH 6, That the provision of law under which the relator claims $72 per month from June 17, 1878, is contained in the act of June 16, 1880 (21 Statutes at Large, p. 281), the operation of which is limited to "all soldiers and sailors who are now (*i. e.*, at the date of the said act) receiving a pension of $50 per month under the provisions of the act" therein cited; whereas the relator, according to his own showing and in fact, was at the time only receiving a pension of $18 per month, which had been fixed by the then Commissioner of Pensions in the exercise of his discretion.

This same defense was made before the Supreme Court, and was overruled. This serious objection stands in the respondent's way now, but let us examine this defense and see if there is as much as a microbe in it. If as much as a *speck* can be *discovered* on the surface by the use of the most powerful judicial microscope ever used in a court of justice to distinguish the nicest points of the law the relator will surrender.

Secretary Teller decided that Miller "*comes under the meaning of the law granting pensions to those persons who require regular aid and attendance,*" upon an application for pension filed with the Commissioner of Pensions many years prior to July 1, 1880.

Now by the mandatory provisions of the act of March 3, 1879, *supra*, he is entitled to arrears of pension from the date of his discharge, for his disabilities were incurred in the service, and the point of time at which the computation of such arrears shall begin is the date of his discharge, August 27, 1865, and not June 16, 1880; and so the law in plain language reads, and where would one in his right senses naturally begin to cast up the arrears of pension due Miller under this final judgment and decision of Secretary Teller holding that the "*pensioner comes under the meaning of the law granting pensions to those persons who require regular aid and attendance?*" Would he begin with the beginning of the law and follow from thence the course of legislation until now? Would he run with the law or would he begin with the last act, June 16, 1880, and trace the computation backward to the beginning? A crank, who believes he is stemming the current of time, and who, on the first day of every January, turns his calendar back instead of forward one year, vainly imagining that if he lives long enough he will become a contemporary of Christ and the Apostles, and if he lives to a still greater antiquity he will see and converse with Abraham, Moses, Isaac, and Joshua, witness the Flood, and behold Noah and his "great aggregation" in the Ark, and if he can manage to hold out to the end will be present at the Creation and hear the sweet music when the "morning stars first sung together," might begin with the last act, that of June 16, 1880, and, not finding Miller then on the roll at $50 per month, come to the absurd conclusion that he could not be rated at $72 per month from June 17, 1878, by the operation of that act.

But there is no need of speculating as to what a *crank* might do. The law-making power in plain and precise terms has directed what shall be done in Miller's case under the said decision of Secretary Teller.

By the act of March 3, 1879, it is plainly declared that the relator thereunder shall be entitled to a pension from the

date of his discharge, and that he shall be pensioned from thence according to the degree of his disability and the provisions of the pension laws in force from time to time until now.

Let us begin at the date of discharge of the relator, August 27, 1865, and, obeying the plain letter of this act, trace his case from thence, under the law, until now, and we plainly see that for the adjudged disability of the relator, namely, that the "*pensioner comes under the meaning of the law granting pensions to those persons who require regular aid and attendance,*" the following rates of pension are expressly and specifically provided, namely, $8 per month from date of discharge; $25 per month from June 6, 1866; $31.25 per month from June 4, 1872; $50 per month from June 4, 1874, and $72 per month from June 17, 1878. These rates are expressly granted by the acts and parts of acts hereinbefore cited.

But the respondent says that the relator was not on the roll at $50, but at $18 per month, June 16, 1880; *ergo*, his pension is not increased to $72 per month from June 17, 1878. The Pension Bureau, nevertheless, issued the relator's certificate at $50 per month from January 14, 1885. How did that happen? Under what law of Congress was this done? There is but one act of Congress that provides the rate of $50 per month, and that is the act of June 18, 1874, *supra*. That rate is thereby provided for the degree of disability requiring "*the regular personal aid and attendance of another person,*" and under its provisions the relator is adjudged to come by the decision of Secretary Teller in question; but that act does not provide this rate to commence from and after January 14, 1885, by a large majority. On the contrary, by the second section of the act that rate is granted from and after June 4, 1874. The difference between the law of Congress in point of time and the action of the Pension Bureau under respondent's predecessor and herein complained of is just ten years seven months and ten days.

If Secretary Teller's decision had been carried out according to law the relator would have received $50 per month from June 4, 1874, the date fixed therein, and this would have put Miller on the roll at that rate long years before the date of the act of June 16, 1880. He would also have received $25 per month from June 6, 1866, and $31.25 per month from June 4, 1872. Is this plain?

What, then, is the trouble? It lies in a nutshell. Secretary Teller decided that Miller "*comes under the meaning of the law granting pensions to those persons who require regular aid and attendance.*" The Pension Bureau *decides that he does not come under the meaning of such law, but under section* 4698½, *Revised Statutes.* The Pension Bureau simply reverses the judgment of the head of the Department, and, in so doing, defrauds the relator out of his arrears of pension under such judgment.

And "*the genius of man can devise no shift*" to take this case from under the charge I thus place upon it. There is absolutely no ground on which a contrary contention can be predicated. Miller comes either "*under the meaning of the law granting pensions to those persons who require regular aid and attendance*" or under said section 4698½, *supra.* There is nowhere else he can come. The head of the Department decides the former to be the facts in the case; the Commissioner of Pensions, reversing the Secretary, holds the latter to be the case of the relator. And so plain is this the case that any person, not mentally blind, can see it; and so it was understood by the author of the fraud at the time thereof. Black had nothing to do in perpetrating this fraud against Miller any more than the respondent has. The author and progenitor of this fraud against Miller was Calvin B. Walker, who was second deputy commissioner under Dudley and first deputy for four or five months under Otis P. G. Clarke.

Walker had resolved to down Miller and was greatly incensed when the Secretary sustained the relator's contention,

and, counting upon the fact that the secretary was about to surrender office to his successor and could afford no further relief to the relator, boldly set at defiance the decision in question.

It is all gammon to suppose that the Pension Bureau does not know that Miller would get just what he claims if the decision in question of Secretary Teller was carried out according to law.

If the employees of the Pension Bureau have not sufficient sense to know this, they certainly would not know enough to find their way back to the Pension Office if, by any chance, they should find themselves four or five squares therefrom—out of sight of the building.

Not on the roll at $50, but at $18 per month, on June 16, 1880! Therefore he cannot be increased to $72 per month from June 17, 1878, by operation of the act of June 16, 1880! This is the defense here, and it was made in the Supreme Court of the United States in this very case against Black, and by that Court utterly repudiated.

Suppose that Miller was not on the pension roll at all on June 16, 1880, but had applied to be put thereon prior to July 1, 1880; would he not in such case be entitled, under the said decision of the Secretary, to just what he now claims? Is he now entitled to less by reason of his having been pensioned for only a part of his pensionable disability? Under what law of Congress could such iniquity be wrought out?

The respondent further says that the rate of $18 per month, at which the relator was then pensioned, was fixed "by the Commissioner of Pensions for the time being in the exercise of his lawful discretion in the premises."

Suppose that was so, what would it have to do with Secretary Teller's decision? Would it relieve the Commissioner from the ministerial duty of carrying that decision out, according to the judgment of the Supreme Court of the United States?

But when the respondent talks about the Commissioner

of Pensions fixing the rate of $18 per month in any case, in the exercise of his "lawful discretion," he cannot refer to any law or laws of Congress, since by such laws such rate is specifically provided for a specific disability; and, further, by such laws the "discretion" of the Commissioner in "fixing" the rate of pension in any case, is restricted to within $18 per month (§ 4699 R. S.) that is, he can fix the rate at any figure less than $18.

IN THE 7TH PARAGRAPH, That he is advised it is beyond the province of this court to revise or review the interpretation placed by him upon the said act of June 16, 1880, and conceives it would be destructive of uniformity and productive of disorder for the Judicial Department of the Government to interfere in the administration of the complicated system of laws establishing and regulating pensions.

The interpretation the respondent may put on the act of June 16, 1880, or any other act of Congress, has nothing whatever to do with this case. The respondent is at liberty to place whatever interpretation he pleases upon the laws of Congress. This suit does not call in question such interpretation. It is not predicated upon any interpretation the respondent has placed or that has been placed by his predecessor on any law of Congress, nor can this court take any judicial notice of any such interpretation. Our dogs are on a different trail and following a different scent, nor can they be called off by any noise of this kind.

This suit is predicated solely and exclusively on the decision of Secretary Teller set out in the petition, and the object is to compel the carrying out of the same by peremptory mandamus.

There is no complaint made in the petition of the interpretation the respondent has placed upon any act of Congress or that he has refused to place upon any act of Congress.

The sole complaint is that the respondent has failed and refused to carry out said decision, in the execution of which

the relator has a vested right. That is all there is to it, and the Supreme Court of the United States has decided that it is the ministerial duty of the respondent to carry out the same, and if he refuses to do so mandamus is the proper legal remedy to compel him.

The question all the time is, Has he carried out the decision and not what interpretation he has placed on the act of June 16, 1880, or any other acts.

If the respondent does not know how to carry out this plain and simple decision, then mandamus will command him how to do it.

He has no judgment nor discretion in the premises unless he can overrule the Supreme Court of the United States, for that is the decision of that Court.

Nor can the respondent avoid the performance of this ministerial duty by placing his own interpretation upon any law of Congress. He may place his own interpretation upon the law, but he shall not thereby avoid the duty of carrying out the decision in question of the Secretary. This ministerial duty is forever in the foreground, and there it will remain until performed. How it is to be performed is too plain for argument. It can be performed only by reissuing relator's certificate at $25 per month from June 6, 1866, $31.25 per month from June 4, 1872, $50 per month from June 4, 1874, and $72 per month from June 17, 1878, and not otherwise.

But what a wonderful amount of sarcasm underlies the averment that for this court to interfere in the administration of the pension system would be "destructive of uniformity" and "productive of disorder." One not knowing the facts to the contrary would be led to believe that there is some "*uniformity*" in the administration of the pension laws by the Pension Bureau. If the respondent undertakes to establish "*uniformity*" in his Bureau he will find *the labor herculean*.

And now I have noticed all the objections to mandamus

made by the respondent in his answer, every one of which were urged in this same case against Black in the Supreme Court of the United States and overruled.

All that now remains is to clearly point out just what the Supreme Court did decide.

IV.

It is a self-evident legal proposition that the Supreme Court of the United States, this court, or any other court can as well determine the meaning of the decision of Secretary Teller in question and what rate of pension the beneficiary therein named is entitled to receive under the "*law granting pensions to those persons who require regular aid and attendance,*" *without* as *with* the return of the respondent; for if the respondent admits that the Secretary made the decision he can make no answer that will effect any change thereof, even as much as the dotting of an "i" or the crossing of a "t," nor can the respondent by his return in any way change the law of Congress applicable thereto. It follows, then, that no valid defense can be made to peremptory mandamus, under the opinion and decision of the Supreme Court in this case, unless such defense shall go directly to the validity of the Secretary's decision, as that the Secretary never made such decision, or that the same was procured by bribery or other fraud, or unless such defense shall set up grounds that shall completely overthrow the relator's case, as that there is no such pension case on the United States pension roll as by him described, or that the relator is not the beneficiary named in the decision of the Secretary, or that the relator was never in the military service of the United States, or that he was never disabled therein, as by him alleged, or that the relator is a fictitious character and not the genuine Charles R. Miller whose pension-appeal case the Secretary considered and in whose behalf rendered the decision set out in the petition, or such defense must allege that the de-

cision has been already carried out according to the prayers of the petition, or such defense must set up grounds that shall be wholly inconsistent with the averments and claims of the petition. Is this plain?

Now, instead of any defense of this kind, the respondent (not denying a single allegation of the petition, and the court is therefore bound to take the averments of facts in the petition as true) undertakes to defend, so to speak, by glancing blows, namely, that he is the ultimate judge of all questions arising in the administration of the pension law, subject only to the right of appeal to the Secretary; that the relator has been borne on the roll for many years and paid such rates of pension as the Commissioners of Pensions have fixed; that there is no law, and never has been, granting a specific rate of pension for the relator's disability; that the amount thereof is fixed by the Commissioner of Pensions in his discretion; that he his under no duty to disclose the grounds or reasons for his action in the case; that the decision in question has been carried out according to his understanding of the same and according to the judgment and discretion of his predecessor, and that such action was approved on appeal by Assistant Secretary Hawkins; that on the 6th February, 1885, the same Secretary rendered a certain decision in the relator's case in which he held that he "*is constrained to think that he* (relator) *does not require regular aid and attendance within the meaning of the law;*" that on the 12th of February following the same Secretary, upon *additional* evidence, rendered another decision, partially reversing and partly affirming the said prior decision, holding that "*after a careful review of all the facts in this case the Department is constrained to think that the pensioner comes under the meaning of the law granting pensions to those persons who require regular aid and attendance,*" and that the same has been carried out by respondent's predecessor and according to the understanding, judgment, and discretion of both; that the respondent, not being on the roll at $50 per month at the date

of the passage of the act of June 16, 1880, his rate of pension is not by that act increased to $72 per month from June 17, 1878; and that it is not within the province of the court to review his interpretation of the said act of June 16, 1880.

These are the defenses offered by the return (if defenses they may be called) to peremptory mandamus, and that, too, in the face and eyes of the opinion and decision, in the case of the Supreme Court, that it is the ministerial duty of the Commissioner of Pensions to carry out the said decision without further question, and that so far as respects the matter decided there is no judgment nor discretion left. Is there any merit therein?

In order to clearly see and understand just what the Supreme Court did decide in the Miller case it is necessary to begin with the Dunlap case against Black, 128 U. S., 40.

There were three petitions for the writ against respondent's predecessor, John C. Black, namely, those of Oscar Dunlap, Frank Rose, and the relator herein, Charles R. Miller.

Black had found that Dunlap was so totally and permanently disabled from the loss of the right hand and right foot and the fracture of the skull and left jaw, causing epilepsy, as to be "*rendered utterly helpless or so nearly so as to require from thence until now the regular personal aid and attendance of another person,*" and that "*the degree of helplessness shown was that contemplated by law.*" This finding of the degree of Dunlap's disability was upon his application filed June 26, 1880.

He was thereby adjudged to have the same degree of disability that is adjudged to exist in the relator's case by the decision of the Secretary in question, and since Dunlap filed his claim within the terms of the act of March 3, 1879, he was, of course, entitled to arrears of pension and at the same rates with Miller and under the same acts and parts of acts of Congress which are hereinbefore set out.

But Black coupled with his judgment on the facts in Dunlap's case his judgment on the law applicable thereto. In other words, in one and the same judgment he passed upon the facts and the law.

My contention was that having found the very facts to exist in Dunlap's case that are declared in the law as entitling him to the specified rates of pension, as claimed in his petition, Black could not substitute his arbitrary will for that of the law-making power, though such substitution be a part of the very same judgment, and thereby defraud Dunlap out of arrears of pension granted to him by the plain letter of the law, and having undertaken to do this very thing that mandamus would lie to compel him to carry out his own decision on the facts according to law. The Supreme Court, in its opinion by Mr. Justice Bradley, states my contention with absolute precision and then proceeds to turn such contention into the reason why mandamus will not lie. The error in my contention is made perfectly manifest in the Dunlap and Rose cases by the opinion and decision of the court.

To pass upon the facts and the law applicable thereto in a claim for invalid pension involves the exercise of judgment and discretion and pertains to the executive functions of the Commissioner of Pensions, and, no matter how great may be the wrong or how villainous the fraud thereby perpetrated, mandamus will not lie to afford relief to the pensioner whose rights under the law of Congress are thus outraged or "sported away." In such case relief can be had only by writ of error, which does not obtain in such case, as the courts have no appellate authority over executive officers in the discharge of their official duties.

But where the initial facts are such as to reduce an act an executive officer is required to perform by virtue of his office into a mere ministerial duty, then mandamus will lie to compel the performance of such duty according to law.

No lawyer can study the Dunlap and Rose cases without

seeing that mandamus is inevitable in the Miller case, for that case is free from every objection to the writ found in the other two cases by the Supreme Court of the United States.

On Miller's appeal, contending that, upon the facts and evidence therein, he was justly entitled to be adjudged to be so permanently and totally disabled as to be rendered utterly helpless or so nearly so as to require the regular aid and attendance of another person, the Secretary decided the naked facts in the case, and, sustaining the relator's contention, held that "*the pensioner comes under the meaning of the law granting pensions to those persons who require regular aid and attendance.*" But the Secretary did not undertake to interpret that law, but left it with the Commissioner to carry out his decision in accordance therewith.

And herein lies the great difference in the underlying principles between the case of Miller and the other two cases of Dunlap and Rose. It is the ministerial duty of the Commissioner to carry out the Secretary's decision according to law, and it makes no difference whether that law be couched in plain and simple language (as is the case) or whether it is complicated, intricate, and couched in language of doubtful meaning; the decision must be carried out in accordance therewith, and if the respondent fails to do so, then mandamus will compel him, pointing out the way, and, if needs be, expounding, interpreting, and construing such law, as in the case of Butterworth *vs.* Hoe, 112 U. S., 50. Nor can the Commissioner of Pensions be relieved from the performance of such ministerial duty by any Hawkins or by anybody else, not even by the President. When an act to be performed by an executive officer of the Federal Government becomes a ministerial duty, such officer is bound by law to perform the same at the instance of the citizen, who has a vested right in such performance, and to hold that such executive officer can be relieved therefrom by any superior authority would be to place such superior above the law.

The Republic is not built that way, nor does it shelter under its Constitution and laws any such arbitrary power. The vested rights of Miller to the accrued or arrears of pensions, under the decision of the Secretary in question and the laws of Congress applicable thereto, cannot be "sported away" in any such manner. His right and title thereto are absolute under the law.

Here we have a foundation for mandamus to operate on, the final decision of the Secretary, and there can be no valid defense that shall fall short of destroying that foundation. Does the respondent even attack it in his answer? On the contrary, the whole defense is one of confession and avoidance, and this will not suffice under the judgment of the Supreme Court already in the case.

All there is in this case was before the Supreme Court. Every objection to the writ that is made in the return of the respondent was there made and urged against alternative mandamus; nor is this all. In addition to all the defenses that are now made, three other and distinct defenses were made by the Department of Justice through Assistant Attorney General William A. Maury, namely, that the relator ought to have applied to the President to remove from office the contumacious subordinate; that the relator should have brought against the contumacious Commissioner of Pensions a civil suit for damages, and, lastly, that the Secretary has no appellate authority over the Commissioner of Pensions, and likened the relation to that sustained by the head of the Department to the Commissioner of Patents, referring to the case of Butterworth *vs.* Hoe, *supra.* These defenses were severally overruled by that Court.

The attention of the court was called to the acts and parts of acts of Congress in their chronological order that constitute the "*law granting pensions to those persons who require regular aid and attendance,*" and as the same are set out hereinbefore. Of course, whether Miller came under the meaning of these acts and parts of acts, as decided by the Secre-

tary, or under section 4698½ *supra*, as decided by the Pension Bureau, reversing and overruling the Secretary, was the main question before that Court. The decision of the Court on that question is evidenced by its judgment reversing this court and granting the alternative mandamus as applied for by the relator. In the opinion the decision of the Secretary is declared to have left no room for the further exercise of judgment or discretion on the part of the Commissioner of Pensions.

And, now, is it not perfectly clear that the respondent offers no defense in his return that has not been considered and overruled by the Supreme Court? Is it not perfectly obvious that this court is bound to grant the peremptory mandamus, as prayed for in the petition, or reverse the Supreme Court of the United States in this very case against Black?

We all know that this court has no judicial authority to reverse or overrule the highest judicial tribunal in all the land, and presumably this court would not intentionally undertake to do so.

The incontrovertible fact, however, remains that this court did, on the 18th February last, just fourteen days prior to the inauguration of Benjamin Harrison as President, reverse that Court in this case against Black, and every ground upon which the judgment, so reversing that Court, proceeded was presented to and duly considered by that Court and overruled, as hereinbefore set forth; and not only did this court reverse the Supreme Court of the United States in this case, but in holding that Hawkins had any power or authority to overrule the decision of Secretary Teller in question or was possessed of any power or authority in any manner or form to relieve Commissioner Black from the performance of the simple ministerial duty of carrying out the said decision, overruled that Court in Kendall *vs.* Stokes, 12 Pet., 524, and in The United States *vs.* The Bank of Metropolis, 15 Pet., 401, to which the attention of this court was drawn.

In conclusion and in behalf of the relator, whose rights, under the law, have been thus successfully "sported away" through one entire administration of the Federal Government and one year of that of another, and to the end that the law shall not be wholly defeated by delay upon delay and this utterly crippled Union soldier be entirely defrauded out of his vested rights in the premises, I earnestly appeal to the court to promptly render its judgment, whatever it may be, in this case, so that if the relator shall feel aggrieved thereby he may exercise his unquestioned right to appeal for redress to the Supreme Court of the United States.

J. G. BIGELOW,
Attorney for Relator.

APR 7 1890
JAMES H. MCKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

Mandamus. No. 1572.

THE UNITED STATES EX RELATIONE CHARLES R. MILLER, PLAINTIFF IN ERROR,

vs.

GREEN B. RAUM, COMMISSIONER OF PENSIONS, DEFENDANT IN ERROR.

In Error to the Supreme Court of the District of Columbia.

BRIEF OF THE PLAINTIFF IN ERROR IN REPLY TO DEFENDANT IN ERROR.

J. G. BIGELOW,
Attorney for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS.

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The brief of the Assistant Attorney General in behalf of the defendant in error correctly states the rates of pension received by the relator, excepting the one error in the beginning, wherein he states the "plaintiff in error drew a pension of $8 a month from August 27, 1865, the date of his discharge, to June 4, 1872." He drew $8 per month to June 6, 1866, thence $15 per month to June 4, 1872. This error is, however, corrected by what follows.

The claim also of the plaintiff in error under the decision of the Secretary in question is correctly stated.

But the learned Assistant Attorney General falls into error when he supposes that Mr. Attorney General Devens had correctly defined what constitutes a "*specific*" disability under the law in the opinion referred to. The error of the Attorney General in attempting to define the difference between "*specific*" and "*non-specific*" disabilities arises out of the fact that he had never examined critically the pension system. While the disability resulting from the "loss of a hand" or "foot" is a "*specific*" disability, because the rate of pension is expressly fixed in the law, the disability from the "*loss of an eye*" is a "*non-specific*" disability and comes under section 4699 Revised Statutes, unless the pensioner sustained, in such loss, a head injury that incapacitated him perform manual labor equally with the loss of a hand or foot, in which case the disability would belong to the third class of *specific* disabilities. According to the opinion of the Attorney General, the disability from the loss of a *thumb*, *finger*, or a *toe* would be a *specific disability*, because *no* medical examination is required "to ascertain and declare their nature and extent," while a case of *total blindness* or *total deafness* would be a *case of non-specific* disability, because a "medical examination to ascertain and declare their nature and extent" is required; and thus, by this opinion, disabilities for which the rate is not *specified* in the law become "*specific*" disabilities, while, on the other hand, disabilities for which the rates are *specified* in the law become "*non-specific*" disabilities.

This opinion of the Attorney General is clearly erroneous. It proceeds upon the theory that the *injury* or *disease* and *not* the resulting *disability* is the thing pensionable—a theory entirely wrong.

As I have often said, it is the *degree* of disability, no matter from what cause arising, that makes a case *specific* or *non-specific* under the law. If adjudged upon all the proofs,

including the medical reports of an examination of the claimant, to be equivalent to that resulting from the loss of a hand or foot or greater, it is then a case of *specific* disability; but if adjudged to be less, then it is a case of *non-specific* disability.

There is no chance for a difference of opinion on this question. The pension system, while somewhat complicated, is singularly free from all ambiguities. I have given to it more careful consideration and study by reason of these cases than any other person living, and in their interpretation and meaning there is no more chance for me to make a mistake than to make a mistake in the multiplication table.

This Court, in the case of Burnett *vs.* The United States, 116 U. S., 160, gives a correct idea of a "*specific*" disability in the pension laws.

The Attorney General, in the opinion referred to, seemed to think that the "*loss of a hand or foot or an eye*" was a *disability*, and this is his error. These are but *causes* of *disability*, and *disability* and *not* the cause is the thing pensionable.

A case of *permanent specific* disability is defined in section 4692, Revised Statutes, to be one "*for which the rate of pension is expressly provided*," and the *cause* of the disability has nothing to do with it. The loss of both hands or the loss of both feet or the total loss of the sight of both eyes does *not* entitle a claimant to be rated in the first class, unless such loss has resulted in such total and permanent helplessness as to require the "regular aid and attendance of another person." (See proviso to act of June 18, 1874; brief in court below, p. 13.) We all know that such loss is bound to result in this degree of helplessness; but it is the *degree of disability* that calls for the specified rates in the law and *not* the cause thereof. Any other or different view of the law is erroneous.

In this connection I desire to call to the attention of the court the opinion of the Attorney General in the case of General Ward B. Burnett, who was a pensioner for wounds

received in the war with Mexico and whose case could not therefore come under the arrears of pension act of March 3, 1879, since that act by its terms applies only to cases of disability incurred subsequent to the 4th March, 1861.

General Burnett was pensioned according to his rank at the time he sustained his wounds and incurred his disabilities, namely, at $30 per month (section 4695, R. S.), and the court will observe that there is *no merger* of all rank in this condition of helplessness requiring aid and attendance of another person under the law until from and after June 4, 1872, from which date this condition of helplessness calls for the same rate of pension in all cases without regard to the question of the rank of the pensioner.

General Burnett was in this condition of permanent helplessness, but failed to apply for $31.25 per month under section 4, act 3d March, 1873 (section 4698 R. S.); failed to apply for $50 per month from June 4, 1874, under the amendatory act of June 18, 1874, *supra*, and failed to apply for $72 per month from June 17, 1878, under act of June 16, 1880, until some time thereafter, when he applied to have his certificate reissue at the rates specified and to be allowed the monthly differences between such rates and $30 per month, the rate he had received.

The question arose on this application whether General Burnett's application could be allowed in view of the language of the first section of the act of June 16, 1880, which provides "That all soldiers and sailors who are now receiv-
"ing a pension of fifty dollars per month under the pro-
"visions of an act entitled 'An act to increase the pension
"of soldiers and sailors who have been totally disabled,' ap-
"proved June eighteenth, eighteen hundred and seventy-
"four, shall receive, in lieu of all pensions now paid them
"by the Government of the United States, and there shall
"be paid them in the same manner as pensions are now paid
"to such persons, the sum of seventy-two dollars per month."

The second section of the act provides that these provisions shall relate to June 17, 1878.

This question was referred to the Attorney General for his opinion, and that officer returned his opinion, dated April 10, 1882, in which he said: "The intent and spirit of the "act of June 16, 1880, is that all those soldiers and sailors "whose *present right* it was at the time of its passage to de- "mand and receive a pension of fifty dollars a month under "the law of 1874 (June 18) should have the same increased "to seventy-two dollars." The opinion is not yet published.

Burnett's certificate was thereupon reissued at $31.25 from June 4, 1872; $50 from June 4, 1874, and $72 per month from June 17, 1878.

The opinion of the Attorney General arrived at the correct conclusion, but the question submitted to him by the Department of the Interior could only arise from a failure to observe the maxim, "never to cross a bridge until you came to it."

It was conceded in the Burnett case that he had the degree of permanent disability to entitle him to the rates that I have specified, and which he claimed, and as there were no limitations of the law to his claim when actually made after June 16, 1880, the *initial point* of time for the consideration of his claim was June 4, 1872, the date from which the law increased his pension from $30 to $31.25 per month, and *not* June 16, 1880. Had the Pension Bureau or the Department begun at that point of time and traced his case from thence without regard for the act of June 16, 1880, until they reached it in its chronological order, they would have found no difficulty at all, because they would have got the claimant on the roll at $50 per month from June 4, 1874, under the act of June 18, 1874.

This opinion of the Attorney General is made the foundation of rule 19, page 196, of the practice of the Pension Bureau, which is as follows:

19. "Persons, on June 16, 1880, pensioned at a lower rate

than $50 per month, whose disabilities have *since that date* increased to such a degree as to entitle them to the benefits of the act of June 18, 1874, and persons whose disabilities may hereafter increase to such an extent as to entitle them to the benefits of the last-named act are not entitled to the benefits of the act of June 16, 1880."

The law is stated correctly in this rule, and if applied to the decision in question of the Secretary, and if that decision should be carried out in accordance therewith, the relator would get precisely what he claims.

The argument of the Assistant Attorney General is that the relator's disability must have been progressive, and that his case must have come under section 4698½ Revised Statutes, and not, as the Secretary decided, "under the meaning of the law granting pensions to those persons who require the regular aid and attendance of another person." As to what facts necessarily entered into this decision of the Secretary, I refer to my brief in the court below, pages 15, 16.

But the answer of the respondent cannot be helped out this way. This case must be tried and determined on the averments of the petition and answer under the respective corporal oaths of the relator and respondent.

The answer in no way denies a single allegation of the petition. Those allegations are, therefore, to be taken as true.

Tapping on Mandamus, 353.

The averment of the petition on this question is "that "his said wounds and injuries resulted in the necrosis of the "lower vertebræ of the spine, followed by anchylosis of the "spinal column, the necrosis of the bones of his left leg and "foot, followed by anchylosis of the left knee, ankle, and "toes of the left foot and great atrophy of the entire limb, "whereby he *became, was, and still is so totally and permanently* "*disabled as to be rendered utterly helpless or so nearly so as to* "*require the regular personal aid and attendance of another* "*person.*" (R., 1.)

This allegation is not denied in the respondent's answer. It must, therefore, be taken as true.

But this is not all. In the 7th paragraph (R., 2 and 3) the relator sets forth the evidence upon which the Secretary rendered the decision in question, and a part of that evidence was the five original photographic views of the causes of the relator's disability, taken at the date of his discharge. These photographs showed to the Secretary that the relator's disability was then precisely as the same appeared upon a personal examination of the relator, and these averments are nowhere denied in the answer.

Nor yet is this all. This Court will take judicial notice of the laws of nature, one of which is that the disability resulting from an anchylosed spinal column or from the anchylosis of the knee, ankle, and toes of the foot is *permanent* because the *causes* are *permanent.*

Suppose I should reply to the argument of the Assistant Attorney that at my request Senator Teller, with the record of this case as against Black before him, and all the written briefs and arguments therein, had addressed a note to me to the effect that it was then the intention of the Department to have granted, in and by the decision in question, the highest rate of pension provided by the general pension laws to the relator, it would not be legitimate argument. Yet this is true, and the Pension Bureau has the letter. Nor is it legitimate argument for the Assistant Attorney General to substitute his views on the question of the *permanency* of the disability of the relator for the respondent's answer.

It is contended in the argument for the respondent that the statement of the petition that the relator had been contending for so many long years before the Pension Bureau and finally appealed to the Secretary in 1884 "*calls for close scrutiny;*" and the inference is drawn that Miller's disability did not exist then as now. I draw the contrary inference. The fact that he incessantly made such claim after the passage of the act of June 6, 1866, in connection with

the five photographic views and the decision of the Secretary in effect that his disability had been and still is *permanent*, is pretty good *evidence* to my mind that his *disability* from an anchylosed spinal column and an anchylosed knee, ankle, and toes of the foot had been since its incurrence and now is of a *very* permanent character.

The mere circumstance that the relator did not appeal to the Secretary before he did cuts no figure in the case. There are thousands of just such cases. But I am not going into this.

There is absolutely no ground on which to predicate an argument against the allowance of peremptory mandamus in view of the answer of the respondent and the opinion and decision of this Court already in the case.

The learned Assistant Attorney General, I think, acted wisely in not calling to the attention of this Court the opinion and decision of the lower court. He could not afford to do this. I could, and so I set the same out in my supplemental brief herein.

I still respectfully submit that the prior decision of this Court ought to be adhered to.

J. G. BIGELOW,
Attorney for Plaintiff in Error.

SUPREME COURT OF THE DISTRICT OF COLUMBIA.

IN GENERAL TERM.

THE UNITED STATES, EX REL. CHARLES R. MILLER, VS. GREEN B. RAUM, COMMISSIONER OF PENSIONS.

[No. 30,102. At Law. Decided February 17, 1890.]

The Commissioner of Pensions is invested with a judicial discretion in his interpretation of the law as to the amount due a pensioner for a given disability, and this court can not interfere by mandamus to correct it.

JUSTICES HAGNER, COX, and JAMES sitting.

PETITION for mandamus; heard in the General Term in the first instance.

The facts are stated in the opinion.

J. G. Bigelow, for the relator.

John Blair Hoge, for respondent.

Mr. Justice COX delivered the opinion of the court.

The case of the United States, on the relation of Charles R. Miller, against John C. Black, formerly Commissioner of Pensions, and now against Green B. Raum, the present Commissioner, has been submitted to us upon printed briefs. The application is for a mandamus, or a rule to show cause why a mandamus should not issue, against the Commissioner, commanding him to issue a new pension certificate to the relator, allowing him a pension at the rate of $72 per month from June 17, 1878.

At the close of the war, acts of Congress were passed, as we all know, providing different rates of pension for disabled parties, varying according to the different forms of disability.

For example, an act of March, 1873, provided one rate of pension for persons who had lost one hand or one foot, and a different rate for those who had lost both arms or both hands, or who had become blind or who had become so helpless as to require the regular personal aid of another person. And subsequently these rates of pension were increased by several acts of Congress.

This relator was rated by the office in the first class, *i. e.*, of those who were only partially disabled, on the ground that he had become disabled in one foot—his left foot. Several different certificates were issued to him at different times by which he was allowed $8 per month from the date of his discharge; $25 per month from June 6, 1866; $31.25 per month from June 4, 1872, and $50 per month from June 4, 1874. He claimed, however, that he was entitled to be rated in the other class, viz, of those who were wholly disabled and dependent upon the assistance of a third person, and he made very persistent applications to the office to be rerated. The Commissioner of Pensions decided against him, and upon appeal to the Secretary of the Interior, the decision was at first affirmed, but afterwards Secretary Teller addressed this communication to the Commissioner:

DEPARTMENT OF THE INTERIOR,
Washington, D. C., February 12, 1885.

THE COMMISSIONER OF PENSIONS:

SIR: Herewith are returned the papers in the pension claim, certificate No. 55,356, of Charles R. Miller.

It appears from the papers that Mr. Miller's claim was before this Department on the 6th instant, and it was held "the pensioner is greatly disabled, and it is evident from the papers in his case that he is utterly unable to do any manual labor, and is, therefore, entitled to $30 per month under the act of March 3, 1883, which has been allowed him by your office."

Since the departmental decision above referred to the papers in the claim have been carefully reconsidered by the Department and a personal examination of the pensioner made, and it satisfactorily appears that he is unable to put his shoe and stocking on the foot of the injured leg, for the reason that the "nearest point that can be reached by hand from foot is 23 inches," and for the further reason that from "necrosis of the lower vertebræ of the spine, producing anchylosis of the spinal column and destruction of some of the spinal nerves," he is unable to bend his back.

After a careful review of all the facts in this case the Department is constrained to think that the pensioner comes under the meaning of the law granting pensions to those persons who require regular aid and attendance.

The decision of the 6th instant is, therefore, overruled, in so far as it denies that the pensioner requires regular aid and attendance.

Very respectfully,

HENRY M. TELLER, *Secretary.*

That case is provided for by several laws. The act of March, 1873, provides a pension of $31.25 per month for all persons who had lost their sight or both hands or both feet, or had become permanently and totally disabled so as to require the regular aid and attendance of another person; and by the act of June 18, 1874, it was provided that in case of blindness or loss of both hands or feet or total helplessness requiring the regular personal aid of another person, the pension should be increased from $31.25 to $50 per month; again by act of June 16, 1880, it was enacted that all those then—that is, at the date of that act—receiving pension at the rate of $50 per month under the act of June, 1874, should receive $72 per month from June 17, 1878.

Now, the relator assumed that when the Secretary of the Interior had decided that the claimant was in the category of those who were totally disabled and required the regular assistance of a third person, it was in effect a decision that he was entitled to be rated for a pension of $72 per month; and thereupon he applied for that relief, and it was denied. The Commissioner held that he did not fall within the terms of the law. Thereupon, he applied to this court for a rule to show cause why a mandamus should not issue, requiring the Commissioner, as he expressed it, to carry out *fully* the decision of the Secretary of the Interior. Upon examination of his petition, upon demurrer, the court were against him, holding that the matter was committed to the judgment and discretion of the Commissioner of Pensions and we could not interfere. The case was then carried by writ of error to the Supreme Court and the court there say, after reciting the application of the relator in the court below:

> The petition goes on to state that the former Commissioner of Pensions refused to carry out the Secretary's decision to its full extent, and that the present Commissioner, the respondent, still refuses. If, as the petition suggests, the Commissioner of Pensions refuses to carry out the decision of his superior officer, there would seem to be prima facie ground for at least calling upon him to show cause why a mandamus should not issue. This was all that the petitioner asked, and this the court refused. As a general rule, when a superior tribunal has rendered a decision binding on an inferior, it becomes the ministerial duty of the latter to obey and carry it out. So far as respects the matter decided, there is no discretion or exercise of judgment left. This is the constant course of justice. The appellate court will not hesitate to issue a mandamus to compel obedience to its decisions.
>
> The appellate tribunal in the present case is the Secretary of the Interior,

who has no power to enforce his decisions by mandamus, or any process of like nature; and, therefore, a resort to a judicial tribunal would seem to be necessary, in order to afford a remedy to the party injured by the refusal of the Commissioner to carry out his decision. But it is suggested that removal of the contumacious subordinate from office, or a civil suit brought against him for damages, would be effectual remedies. We do not concur in this view. A suit for damages, if it could be maintained, would be an uncertain, tedious, and ineffective remedy, attended with many contingencies and burdened with onerous expenses. Removal from office would be still more unsatisfactory. It would depend on the arbitrary discretion of the President, or other appointing power, and is not such a remedy as a citizen of the United States is entitled to demand. We think that the case suggested by the petition is one in which it would be proper for the court to interfere by mandamus. Whether it will turn out to be such when all the circumstances are known; can be ascertained by a rule to show cause; and such a rule, we think, ought to have been granted. The judgment of the court below is, therefore, reversed, and the cause remanded with instructions to grant a rule to show cause as applied for by the petitioner.

The petitioner again came into this court and a rule to show cause was accordingly issued, and a return has been made by the present Commissioner of Pensions, the substance of which is, that the Secretary of the Interior did not decide as to the rate of pension to which the relator was entitled at all, but reversed the decision of the Commissioner only on one question—that is, the question of fact whether the relator was so totally disabled as to require the regular attendance of a third person; but that he left unsettled the question as to what rate of pension the relator would be entitled to under those circumstances; and with great respect for the court, he further claims that the law has devolved upon him the power of deciding this question; that he is charged with the duty of examining into these claims and determining what rate of pension is to be allowed; that in the exercise of that judgment and discretion he has come to the conclusion that this relator was not entitled to the benefit of the act of 1880, because that applies only to persons who were receiving $50 per month at the date of that act, and this relator had never satisfied the Department before that date that he was entitled to be classed among those totally disabled, and, therefore, had not been receiving a pension of $50 per month, and that, therefore, the terms of the act of 1880 did not apply to him; and he further shows that an appeal from his decision was taken to the Secretary of the Interior, and the Assistant Secretary, for the time being, affirmed the decision.

Upon this showing the question for us is, whether we can consider it a mere ministerial duty of the Commissioner of Pensions to carry out what is supposed by the relator to be the decision of the Secretary of the Interior; that is, to rate the relator at $72 per month, or must hold that the question was committed to the Commissioner's judgment and official discretion to determine, whether that is the rate of pension to which the relator is entitled, and must dismiss the application for mandamus, simply upon the ground that it would be an infringement upon the jurisdiction conferred upon the Commissioner of Pensions. If we had any doubts on this subject they would be relieved by the decision of the Supreme Court in a case similar to the present one and commenced at the same time that this relator's application was made to this court.

Similar applications were made on behalf of Oscar Dunlap and Frank Rose. In those cases there was no question at the time of the application that the relators were within the class of those suffering from total disability; but the question still remained, to what rate of pension the parties were entitled, and there the same contention took place on the part of the relators as in the present case. It was contended there that under the act of 1880 he was absolutely entitled to a pension at the rate of $72 per month, and that it was a plain ministerial duty of the Commissioner of Pensions, without any discretion, to award him a new certificate at that rate. But there, as here, exactly, the Commissioner decided that the reason why the claimant's rate was not advanced to $72 per month was that he was not, on the 16th day of June, 1880, the date of the act, receiving a pension at the rate of $50 per month, nor was he entitled to receive a pension of $50 per month at that date, for the reason that, while the degree of helplessness which has been shown was that contemplated by the law, the claimant himself (neither on his own motion nor under the guidance of those who are legally responsible for his actions in this claim) had not made application to be rated in pursuance of the act of June 18, 1874, but, on the contrary thereof, had asked to be rated and had been rated at $36 per month under the act of February 28, 1877. The decision proceeds to discuss further the reasons for the conclusion to which the Commissioner had come.

There, just as here, the claimant had been rated as one of those who were only partially disabled, but had not satisfied

the Department that he was entitled to a different rate of pension at the time he made his application, and we held that we could not interfere with the Commissioner. That case went up upon writ of error, and the Supreme Court, after referring to the leading cases on the subject of mandamus, says:

> The principle of law deducible from these two cases is not difficult to enounce. The court will not interfere by mandamus with the executive officers of the Government in the exercise of their ordinary official duties, *even where those duties require an interpretation of the law*, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is imposed upon them, that is, a service which they are bound to perform without further question, then, if they refuse a mandamus may be issued to compel them.
>
> Judged by this rule the present case presents no difficulty. The Commissioner of Pensions did not refuse to act or decide. He did act and decide. He adopted an interpretation of the law adverse to the relator, and his decision was confirmed by the Secretary of the Interior, as evidenced by his signature of the certificate. Whether, if the law were properly before us for consideration, we should be of the same opinion, or of a different opinion, is of no consequence in the decision of this case. We have no appellate power over the Commissioner, and no right to review his decision. That decision and his action taken thereon were made and done in the exercise of his official functions. They were by no means merely ministerial acts.

We understand that to be the law of this case. In the present case the Commissioner, upon a full examination of the facts before him, has decided that this relator is only entitled to receive $50 per month under the act of 1874, and on appeal from him to the Secretary of the Interior for the time being, the Acting Secretary has affirmed that decision. We hold that there is no appeal to us from that rule. We can not interfere by mandamus with the exercise of the judicial authority and discretion which has been invested in these officers by law of the United States; and therefore the judgment must be for the respondent.

Rule dismissed.

APR 5 1890

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

THE UNITED STATES EX RELATIONE CHARLES R. MILLER
vs.
GREEN B. RAUM, COMMISSIONER of Pensions.

No. 1572.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE DEFENDANT IN ERROR.

WM. A. MAURY,
Assistant Attorney-General and of Counsel, etc.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

THE UNITED STATES EX RELATIONE CHARLES R. MILLER
vs.
GREEN B. RAUM, COMMISSIONER OF PENSIONS.
} No. 1572

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE

This seems to be a case entirely unsustainable under the law.

The plaintiff in error drew a pension of $8 a month from August 27, 1865, the date of his discharge, to June 4, 1872, for the total and permanent disability of the left leg (Rec., p. 2). The

legislation under which this allowance was made is embodied in section 4695, Revised Statutes.

From June 6, 1866, he drew a pension of $15 a month. See section 4697, Revised Statutes, for the law authorizing this increase.

From June 4, 1872, he was allowed $18 a month. The legislation authorizing this increase is to be found, now, in section 4698, Revised Statutes.

From November 23, 1881, he was allowed $24 a month under a law now embodied in section 4698, Revised Statutes.

From March 3, 1883, he was allowed $30 a month by virtue of an act of Congress of that date. (22 Stat., 453.)

The plaintiff in error claims that he should have been rated from the beginning as "so totally and permanently disabled as to be rendered utterly helpless, or so nearly so as to require the regular personal aid and attendance of another person," and that he should have received as such $8 a month from the date of his discharge (see section 4695, Revised Statutes); $25 a month from June 6, 1866, to June

4, 1872 (see section 4697, Revised Statutes); $31.25 from June 4, 1872 (see section 4698, Revised Statutes); $50 a month from June 4, 1874 (18 Stat., 78); and $72 a month from June 17, 1878 (21 Stat., 281)

The above figures may be verified by reference to the relator's petition (R., pp. 1 and 2).

At this point it is proper to call attention to the well established classification of disabilities as *specific* and *non-specific.*

What is understood by these terms in the administration of the pension laws has been satisfactorily explained by Mr. Attorney-General Devens in the following language:

> I think the disabilities which are to be deemed "specific" are those *specified* in the above-cited statutes, such as the loss of a hand, foot, or eye. Injuries, like those sustained by Mr. Hutchinson, requiring medical examination to ascertain and declare their nature and extent, and as to the effect of which there is room for difference of opinion, I do not consider "specific" disabilities (16 Op., 335).

It is but to read the relator's own description of his disability to see that it is non-specific.

The disability of the relator being non-specific, it became necessary for him to undergo those medical examinations from time to time which

have been found necessary both to protect the pension fund and to give the pensioner an opportunity to apply for an increase of pension in case his condition should become worse.

The relator states in his petition that—

> While in the said service and in the line of duty he sustained in battle such wounds and injuries as resulted *at the time thereof in his total and permanent helplessness* (R., p. 1).

He further states (R., p. 2, par. 6) that he "*often applied*" to have the alleged error in his rating corrected and "the re-issuance of his said certificate" so corrected as to conform to the law and the facts of his case, but that his applications had been repeatedly rejected.

It is remarkable, and calls for close scrutiny, that in the prolonged struggle which the relator says he carried on with the Commissioner of Pensions, it never occurred to him to appeal to the Commissioner's superior officer, the Secretary of the Interior, until May 9, 1884. (Rec., p. 12.)

It is hardly conceivable that he should have spent the time from his discharge on August 27, 1865, to May 9, 1884, nearly twenty years, in repeated and fruitless applications to the Com-

missioner of Pensions without once appealing to the Secretary of the Interior.

Certainly we may say, with a conviction almost absolute, that no one of the medical examinations to which the relator was subjected, in that long period of time, showed his physical condition to be such as he describes it, or we may be certain it would be in the record.

It would be supposed that the relator's claim would be supported by medical testimony covering the whole period of time for which he asks for an increase of pension; but it is not so, and the only evidence on which the increase is based is the finding of Secretary Teller as to the relator's condition, *as it was made to appear to him in February*, 1885.

By what process of reasoning the conclusion is reached that, because the relator was found by the Secretary, in February, 1885, to come "under the meaning of the law granting pensions to those persons who require regular aid and assistance" (Rec., p. 13), he *must have been in that condition clean back to the time when he received*

his injury, is more than we have been able to comprehend.

The mere statement of the case in the petition is enough to produce a moral certainty that the relator's condition, as described in the Secretary's finding, made in February, 1885, *had not been long such.*

We will now consider, in the light of the above observations, what foundation there is for the charge that the Commissioner of Pensions has refused to carry out the order and decision of his superior officer, the Secretary of the Interior, and so has made himself amenable to legal process.

The case was twice before the Secretary of the Interior, once on February 6, 1885, and afterwards on February 12, 1885. (Rec., pp. 12, 13.)

The action taken by the Secretary on February 6 was as follows:

FEBRUARY 6TH, 1885.

The COMMISSIONER OF PENSIONS:

SIR: Herewith are returned the papers which accompanied your report of the 8th of September last upon the appeal of Mr. Charles R. Miller, of this city, from the action of your office in rating his pension certificate No. 55356.

It appears from your report that Mr. Miller was pensioned at $8 per month from August 27th, 1865, the date of his discharge, on account of a gun-shot wound of his left leg. His

pension was increased to $15 per month June 6, 1866; to $18 per month June 4th, 1872, and to $24 from November 23d, 1881. It was reduced to $18 per month June 4th, 1882, and increased to $24 under the provisions of the act of March 3d, 1883.

Mr. Miller claims in his appeal that the pension should be re-rated from the commencement, and it should be increased on the ground that he needs aid and attendance.

The papers in this case have been carefully considered, and it is the opinion of the Department that the action of your office in rating Mr. Miller's pension was proper, and *that he is now and has been receiving all that he was entitled to under the law, except from June 4, 1882, the date his pension was reduced from $24 per month to $18 per month. He should be allowed the difference between $18 and $24 from June 4, 1882, to the 3d of March, 1883.*

The pensioner is greatly disabled, and it is evident from the papers in this case that he is utterly unable to do any manual labor, and *he is therefore entitled to $30 per month under the act of March 3, 1883, which has been allowed him by your office.*

The Department is constrained to think that he does not require regular aid and attendance within the meaning of the law.

Very respectfully,

H. M. TELLER,
Secretary.

(Rec., p. 12.)

But this action underwent, shortly afterwards, the Secretary's review and reconsideration, as is fully set forth in the following letter, dated February 12, 1885:

FEBRUARY 12, 1885.

The COMMISSIONER OF PENSIONS:

SIR: Herewith are returned the papers in the pension claim, certificate No. 55356, of Charles R. Miller.

It appears from the papers that Mr. Miller's claim was before this Department on the 6th instant, and it was held that the pensioner is greatly disabled, and it is evident from the papers in his case that he is utterly unable to do any manual labor, and he is therefore entitled to $30 per month, under the act of March 3, 1883, which has been allowed him by your office.

Since the departmental decision above referred to the papers in the claim have been carefully reconsidered by the Department and a personal examination of the pensioner made, and it sat-

isfactorily appears that he is unable to put on his shoe and stocking on the foot of his injured leg, for the reason that the "nearest point that can be reached by hand from foot is 23 inches," and for the further reason that from "necrosis of the lower vertebræ of spine, producing anchylosis of spinal column and destruction of some of the spinal nerves," he is unable to bend his back.

After a careful review of all the facts in this case the Department is constrained to think that the pensioner comes under the meaning of the law granting pensions to those persons who require regular aid and attendance.

The decision of the 6th instant *is therefore overruled in so far as it denies that the pensioner requires regular aid and attendance.*

Very respectfully,

H. M. TELLER,
Secretary.

(Rec. p. 13.)

Assistant Secretary of the Interior Hawkins in his letter to the Commissioner of Pensions of July 29, 1886 (Rec., p. 13), overruling the relator's appeal from the action of the Commissioner of Pensions on the communications of Secretary Teller, of February 6 and 12, 1885, states exactly what that action of the Commissioner of Pensions was. The language of the Assistant Secretary is as follows:

> *Upon the receipt by your office of the above-quoted letters a re-issue of pension was granted at* $24 *per month from June* 4, 1882; *at* $30 *per month from March* 3, 1883, *and at* $50 *per month from January* 14, 1885.

The Commissioner of Pensions properly interpreted the letter of Secretary Teller of February 12 as merely reversing his action of February 6 in the *single particular* that the relator was to be

rated *as of that date*, or thereabout, as a person "who required regular aid and attendance." And, accordingly, he was so rated as of January 14, 1885, which date was that of his last medical examination.

When Secretary Teller overruled his decision of February 6 "*in so far as it denies that the pensioner requires regular aid and attendance*," he necessarily *affirmed* that previous decision in all *other* respects and particulars.

It is contended on a ground which we deem wholly untenable, that the finding of Secretary Teller as to the relator's condition on February 12, 1885, should have been given a retroactive operation, and, accordingly, that there should have been a re-rating of the pensioner from the beginning, on the basis that he required regular aid and attendance from the time his certificate bore date.

This was plainly out of the question, because, as the Commissioner states in his answer (R., p. 7), the Pension Bureau had determined that the injuries of the relator belonged to the non-specific class, and, being of that class, it was impossible, under

section 4698½ of the Revised Statutes, for the increase of pension to begin from an earlier date than that of the examining surgeon's certificate establishing the existence of the disability for which the increase is allowed. For the Commissioner to have acted otherwise would have been, furthermore, in direct violation of the express command of the act of March 3, 1879, called the arrears of pension act, "*That in no case shall arrears of pension be allowed and paid from a time prior to the date of actual disability.*"

It was therefore held by the Commissioner that, under the section just referred to, the increase of pension authorized by Secretary Teller in his decision of February 12, 1885, must begin from the date of the last medical examination of the relator, namely, January 14, 1885 (R. p. 8).

The court will note the unusual language of the Commissioner in his answer in referring to the date from which the allowance of $50 a month began, namely, January 14, 1885, as "the date of the physical examination of the relator by the medical officers of the Pension Bureau next preceding the date of said decision

of said Secretary of the Interior" * * (Rec., p. 8).

The Commissioner takes care not to say that the examination of January 14, 1885, showed the disability which the Secretary, in less than a month afterwards, found to exist. This is strongly corroborative of the view, already presented, *that up to the time of Secretary Teller's decision there was nothing on the files of the Pension Bureau to authorize an increase of the relator's pension on the ground that he required regular aid and attendance.*

As to the relator's claim to $72 a month from June 17, 1878. This is, we think, plainly unfounded.

It arises under section 1 of the act of June 16, 1880, (21 Stat., 281), which provides as follows:

> *That all soldiers and sailors who are now receiving a pension of fifty dollars per month,* under the provisions of an act entitled "An act to increase the pension of soldiers and sailors who have been totally disabled," approved June eighteenth, eighteen hundred and seventy-four, shall receive, in lieu of all pensions now paid them by the Government of the United States, and there shall be paid them in the same manner as pensions are now paid to such persons, the sum of seventy-two dollars per month.

It is clear that the relator did not come within that act, because, as his own statement in his pe-

tition shows (p. 2), he was not receiving, at the time that act was passed, $50 a month, under the act of June 18, 1874, *but was receiving only* $18 *a month under a different law.*

It seems, then, that the case is plainly without merit on the law and the facts.

As to the law, however, this court will accept the construction of the pension laws adopted by those appointed to administer them, and not act upon any views of its own in a proceeding of this kind where to do so would be to substitute judicial discretion, which the law does not require, for executive discretion, which the law does require (*U. S. ex rel. Dunlap* v. *Black*, 128 U. S., 40).

It is submitted, therefore, that the judgment of the court below should be affirmed.

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Assistant Attorney-General and of Counsel, etc.

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